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No. 1926

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE CORVALLIS AND EASTERN RAILROAD
COMPANY (a Corporation),

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit
Court for the District of Oregon.

FILED

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No. 1926

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE CORVALLIS AND EASTERN RAILROAD
COMPANY (a Corporation),

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit
Court for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

CORVALLIS AND EASTERN RAILROAD COM-
PANY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Names and Addresses of Attorneys of Record.

WILLIAM D. FENTON, JAMES E. FENTON,
BEN C. DEY, Fenton Building, Portland, Ore-
gon, and JAMES K. WEATHERFORD, Al-
bany, Oregon,

For Plaintiff in Error.

JOHN McCOURT, United States Attorney, Port-
land, Oregon,

For Defendant in Error.

[Citation (Original).]

United States of America,
District of Oregon,—ss.

To United States of America, Greeting:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals for the Ninth Circuit, at San Francisco,
California, within thirty days from the date hereof,
pursuant to a writ of error filed in the Clerk's office
of the Circuit Court of the United States for the
District of Oregon, wherein Corvallis & Eastern

2 *The Corvallis and Eastern Railroad Company*

Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this Nov. 18th, 1910.

CHAS. E. WOLVERTON,
Judge.

United States of America,
District of Oregon,—ss.

Due service of the within Citation is hereby admitted upon the United States and upon me, this 18th day of November, A. D. 1910, within said District.

Dated November 18, 1910.

JOHN McCOURT,
United States Attorney.

[Endorsed]: No. ——. U. S. Circuit Court, District of Oregon. United States of America vs. Corvallis & Eastern R. R. Co. Citation on Writ of Error. Filed November 18, 1910. G. H. Marsh, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

CORVALLIS AND EASTERN RAILROAD COM-
PANY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error [Original].

The United States of America,—ss.

The President of the United States of America, to
the Judges of the Circuit Court of the United
States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in
the rendition of the judgment of a plea which is in the
Circuit Court before the Honorable Robert S. Bean,
one of you, between The United States of America,
plaintiff and defendant in error, and Corvallis and
Eastern Railroad Company, defendant and plaintiff
in error, a manifest error hath happened to the great
damage of the said plaintiff in error, as by complaint
doth appear; and we, being willing that error, if any
hath been, should be duly corrected, and full and
speedy justice done to the parties aforesaid, and in
this behalf, do command you, if judgment be therein
given, that then, under your seal, distinctly and
openly, you send the record and proceedings afore-
said, with all things concerning the same, to the

4 *The Corvallis and Eastern Railroad Company*

United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and there inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable JOHN M. HARLAN, Senior Associate Justice of the Supreme Court of the United States, this November 18, 1910.

[Seal] G. H. MARSH,
Clerk of the Circuit Court of the United States for
the District of Oregon.

[Endorsed]: In the U. S. Circuit Court of Appeals for the Ninth Circuit. Corvallis and Eastern Railroad Company, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed November 18, 1910. G. H. Marsh, Clerk, United States Circuit Court, District of Oregon.

*In the Circuit Court of the United States for the
District of Oregon.*

April Term, 1909.

BE IT REMEMBERED, That on the 7th day of May, 1909, there was duly filed in the Circuit Court of the United States for the District of Oregon, an Amended Complaint, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the
District of Oregon, Ninth Judicial Circuit.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

CORVALLIS AND EASTERN RAILROAD COM-
PANY (a Corporation),

Defendant.

[Amended] Complaint.

Comes now the United States of America, by John McCourt, United States Attorney for the District of Oregon, and by leave of the Court first had and obtained, files this its amended complaint herein, and complains of the defendant and alleges:

I.

That the Corvallis and Eastern Railroad Company is a corporation existing under and by virtue of the laws of the State of Oregon, and is a resident and citizen of said State, and is now and was at all times mentioned herein engaged in operating a line of railroad from Detroit on the east to Yaquina on the west, in said State of Oregon.

II.

That the line of railroad so operated by defendant company runs through and traverses certain tracts of timber land in said State belonging to and adjacent to lands belonging to the plaintiff herein, commonly known as the Cascade Forest Reserve.

III.

That the said defendant company operated its said

6 *The Corvallis and Eastern Railroad Company*

line of railroad in a negligent and careless manner in that said defendant company, on and prior to the 23d day July, 1906, carelessly and negligently failed and neglected to remove from its right of way where the same traverses and passes through the timber land in the State of Oregon belonging to and adjacent to lands belonging to the plaintiff commonly known as the Cascade Forest Reserve as aforesaid, debris and inflammable material consisting of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter, and carelessly and negligently failed and neglected to keep its said right of way in said places clear of such trees, logs, grass and old ties and dead and dry vegetable matter, and carelessly and negligently permitted and allowed large quantities of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter to accumulate along the right of way of said defendant's railroad where the same traversed and passed through said tracts of timber land aforesaid, well knowing that by reason of its said carelessness and negligence, great danger existed that a fire or fires might be started from sparks or cinders from any of its engines being run over said road, or from burning matches or cigar stubs that might be thrown from any of the trains running over said road in passing through said tracts of land, although the said defendant was notified and requested on or about April 24th, 1906, to remove said debris and inflammable material from said right of way and to prevent the accumulation of the same thereon by plaintiff's forest inspector located in Portland, Oregon.

IV.

That on or about the 23d day of July, 1906, said defendant, its agents, servants and employees, ran and operated an engine drawing a train of cars over its said track and right of way where the same traversed and passed through said tracts of timber land hereinbefore described, and said defendant, its agents, servants and employees then and there negligently and carelessly operated and ran said engine, and negligently and carelessly permitted and allowed the same to be out of repair, and negligently and carelessly failed and neglected to equip said engine with spark-arresters and apparatus to prevent the escape of sparks, cinders, coals and fire, and carelessly and negligently placed said engine in charge of and in control of unskillful employees and servants, and by reason of said carelessness and negligence of said defendant company in failing and neglecting to remove from its track and right of way and to keep the same free and clear of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter as aforesaid, and by reason of the accumulation thereof upon its track and right of way and the careless and negligent management and operation of its said engine, and in carelessly and negligently permitting said engine to be out of repair and carelessly and negligently failing to equip said engine with apparatus to prevent the escape of fire, sparks and cinders, said engine being then operated upon and run over said line of railroad by said defendant company as aforesaid, scattered large quantities of sparks, fire and burning cinders upon

8 *The Corvallis and Eastern Railroad Company*

and along said railroad track and right of way of the defendant, and started a certain fire upon said right of way, which said fire spread from said right of way to and upon said tracts of timber land owned by and belonging to plaintiff, and that said fire so started on said right of way and spreading as aforesaid, burned and destroyed two hundred thousand (200,000) feet board measure of merchantable timber belonging to plaintiff, of the reasonable value of One Hundred Dollars (\$100.00); that because of the said fire so started as aforesaid, this plaintiff was put to a great expense in fighting the same and keeping said fire from spreading and destroying other valuable timber belonging to said plaintiff, in the manner and amount as follows, to wit:

Extra labor \$619.25

Transportation and travel 7.30

Supplies and tools 95.99

—and thereby plaintiff suffered damage in the sum of Eight Hundred Twenty-two and 54/100 Dollars (\$822.54) in the manner hereinbefore alleged.

For further and separate cause of action plaintiff complains of defendant and alleges:

I.

That the Corvallis and Eastern Railroad Company is a corporation existing under and by virtue of the laws of the State of Oregon and is a resident and citizen of said state, and is now and was at all times mentioned herein engaged in operating a line of railroad from Detroit on the east to Yaquina on the west in said State of Oregon.

II.

That the line of railroad so operated by defendant company runs through and traverses certain tracts of timber land in said State belonging to and adjacent to lands belonging to the plaintiff herein, commonly known as the Cascade Forest Reserve.

III.

That the said defendant company operated its said line of railroad in a negligent and careless manner in that said defendant company, on and prior to the 11th day of August, 1906, carelessly and negligently failed and neglected to remove from its right of way where the same traverses and passes through the timber land in the State of Oregon belonging to and adjacent to lands belonging to the plaintiff commonly known as the Cascade Forest Reserve as aforesaid, debris and inflammable material consisting of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter, and carelessly and negligently failed and neglected to keep its said right of way in said places clear of such trees, logs, grass and old ties and dead and dry vegetable matter, and carelessly and negligently permitted and allowed large quantities of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter to accumulate along the right of way of said defendant's railroad where the same traversed and passed through said tracts of timber land aforesaid, well knowing that by reason of its said carelessness and negligence, great danger existed that a fire or fires might be started from sparks or cinders from any of its engines being run over said road, or from

burning matches or cigar stubs that might be thrown from any of the trains running over said road in passing through said tracts of land, although the said defendant was notified and requested on or about April 24th, 1906, to remove said debris and inflammable material from said right of way and to prevent the accumulation of the same thereon by plaintiff's forest inspector located in Portland, Oregon.

IV.

That on or about the 11th day of August, 1906, said defendant, its agents, servants and employees, ran and operated an engine drawing a train of cars over its said track and right of way where the same traversed and passed through said tracts of timber land hereinbefore described, and said defendant, its agents, servants and employees then and there negligently and carelessly operated and ran said engine, and negligently and carelessly permitted and allowed the same to be out of repair, and negligently and carelessly failed and neglected to equip said engine with spark-arresters and apparatus to prevent the escape of sparks, cinders, coals and fire, and carelessly and negligently placed said engine in charge of and in control of unskillful employees and servants, and by reason of said carelessness and negligence of said defendant company in failing and neglecting to remove from its track and right of way and to keep the same free and clear of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter as aforesaid, and by reason of the accumulation thereof upon its track and right of

way and the careless and negligent management and operation of its said engine, and in carelessly and negligently permitting said engine to be out of repair and carelessly and negligently failing to equip said engine with apparatus to prevent the escape of fire, sparks and cinders, said engine being then operated upon and run over said line of railroad by said defendant company as aforesaid, scattered large quantities of sparks, fire and burning cinders upon and along said railroad track and right of way of the defendant, and started a certain fire upon said right of way, which said fire spread from said right of way to and upon said tracts of timber land owned by and belonging to plaintiff, and that said fire so started on said right of way and spreading as aforesaid burned and destroyed twelve million nine hundred and sixty-one thousand (12,961,000) feet, board measure, of merchantable timber belonging to plaintiff of the reasonable value of Nine Thousand Eight Hundred Twenty-eight and 50/100 Dollars (\$9,828.50), more specifically stated as follows: Four million four hundred and sixty-four thousand (4,464,000) feet, board measure, of the reasonable value of One and 25/100 Dollars (\$1.25) per thousand feet, and eight million four hundred and ninety-seven thousand (8,497,000) feet, board measure, of the reasonable value of Fifty Cents (\$.50) per thousand feet; and that because of the said fire so started as aforesaid, this plaintiff was put to an expense for fighting the same and keeping said fire from spreading and destroying other valuable timber belonging to plaintiff in the manner and amount

12 *The Corvallis and Eastern Railroad Company*

as follows, to wit:

Extra labor\$49.75

Transportation and travel 2.65

—and thereby plaintiff suffered damages in the sum of Nine Thousand Eight Hundred Eighty and 90/100 Dollars (\$9,880.90) in the manner hereinbefore alleged.

Wherefore, plaintiff demands judgment against defendant in the sum of Ten Thousand Seven Hundred Three and 44/100 Dollars (\$10,703.44), together with interest thereon from August 11, 1906, besides the costs and disbursements of this action.

JOHN McCOURT,

United States Attorney for Oregon.

United States of America,

District and State of Oregon,—ss.

I, John McCourt, being first duly sworn, on oath depose and say that I am the United States Attorney for the District of Oregon, and as such make this verification for and on behalf of the plaintiff herein; that I have read the foregoing complaint and know the contents thereof and that the same is true as I verily believe.

[Seal]

JOHN McCOURT.

Subscribed and sworn to before me this 24 day of April, A. D. 1909.

W. S. MacSWAIN,

Notary Public for Oregon.

Amended Complaint. Filed May 7, 1909. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of June, 1909, there was duly filed in said court an Answer to Amended Complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY (a Corporation),
Defendant.

Answer [to Amended Complaint].

Comes now the defendant, the Corvallis and Eastern Railroad Company, and for its answer to the Complaint of plaintiff filed in the above-entitled court:

I.

Admits that the Corvallis and Eastern Railroad Company is a corporation, existing by virtue of the laws of the State of Oregon, and engaged in operating a line of railroad from Detroit on the east to Yaquina on the west, in the State of Oregon, and had been so engaged during the period mentioned in plaintiff's Complaint.

II.

Denies that the line of railroad so operated by the defendant company runs through or traverses certain tracts of timber land in said State belonging to or adjacent to lands belonging to the plaintiff

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herein, commonly known as the Cascade Forest Reserve.

III.

Denies that the said defendant company operated its said line of railroad in a negligent or careless manner, or that said defendant company on or prior to the 23d day of July, 1906, or at any other time carelessly or negligently or at all failed or neglected to remove from its right of way, where the same traverses or passes through the timber land or elsewhere in the State of Oregon, or the lands belonging to or adjacent to lands belonging to plaintiff, commonly known as the Cascade Forest Reserve, as aforesaid or at all, or the debris or inflammable material or either, consisting of dead or dry trees, or logs, or grasses, or old ties, or other dead or dry vegetable matter, or either or any of them, or carelessly or negligently or at all failed or neglected to keep its said right of way in such places clear of such trees, or logs, or grass, or old ties, or dead or dry vegetable matter or either or any of them, or carelessly or negligently permitted or allowed large or any quantities of dead or dry trees or logs, or grass, or old ties, or other dead or dry vegetable matter or any of them to accumulate along the right of way of said defendant's railroad where the same traverses or passes through said or any tracts of timber lands aforesaid or at all, well, or at all, knowing that by reason of its said or any carelessness or negligence or either, great or any danger existed that fire or fires might be started from sparks or cinders or either, from any of its engines, being or

at all run over said road, or from burning matches or cigar stubs or either, that might be thrown from any of the trains running over said road, or in passing through said tracts or any tracts of land, although the defendant was notified or requested on or about April 24th, 1906, or any other time to remove said or any debris or inflammable material from said or any right of way, or to prevent the accumulation of the same thereon, by plaintiff's Forest Inspector, or any Inspector located at Portland, Oregon.

IV.

Denies that on or about the 11th day of August, 1906, or at any other time the said defendant or its agents, or servants, or employees, or either, ran or operated an engine drawing a train or any cars over its said track or right of way, where the same traversed or passed through said tracts or any tracts of timber land hereinbefore or at all described in plaintiff's Complaint, or that said defendant or its agents or servants or employees, then or there, or at all, negligently or carelessly, or either, operated or ran said or any engine, or negligently or carelessly permitted or allowed the same to be out of repair, or negligently or carelessly, or at all, failed or neglected to equip said engine with spark-arresters or apparatus to prevent the escape of sparks or cinders or coals or fire, or carelessly or negligently placed said engine in charge of, or in control of unskillful employees or servants or either, or by reason of said or any carelessness or negligence of said defendant company in failing or neglecting to remove from its track or right of way, or to keep the

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same free or clear of dead or dry trees, or logs, or grass or old ties or other dead or dry vegetable matter or either or any of them, as aforesaid, or at all, or by reason of the accumulation thereof upon its track or right of way, or either, or the careless or negligent management or operation of its said engine or either, or in carelessly or negligently or at all, permitting said or any engine to be out of repair, or carelessly or negligently or at all failing to equip said engine or any engine with apparatus to prevent the escape of fire, or sparks, or cinders or either, or that said engine being then operated upon or run over said line of railroad by said defendant company as aforesaid, or at all, scattered large, or any quantities of sparks or fire, or burning cinders, or either or any of them, upon or along said railroad track, or right of way, or either, of the defendant, or started a certain, or any, fire upon said or any right of way, or which said fire spread from said right of way to or upon said tracts, or any tracts of timber land owned by or belonging to plaintiff, or that said fire so started on said or any right of way, or spreading as aforesaid, or at all, burned or destroyed Two hundred thousand (200,000) feet, or any number of feet, board measure of merchantable or other timber belonging to plaintiff of the reasonable value of One Hundred Dollars (\$100.00) or any other amount, or that because of said or any fire so started as aforesaid or at all, plaintiff was put to great or any expense in fighting the same, or keeping said fire from spreading or destroying other valuable, or any timber, belonging to said plaintiff

in the manner or the amount as follows, or at all; or for extra or any labor, \$619.25, or any other amount; or for transportation or travel, or either, \$7.30, or any other amount; or for supplies or tools or either or any amounting to the sum of \$95.99, or any other amount, or thereby plaintiff suffered damage in the sum of \$822.54 or any other sum whatever in the manner or at all, as alleged in plaintiff's Complaint.

And for answer to the further and separate cause of action as alleged in plaintiff's Complaint:

I.

Admits that the Corvallis and Eastern Railroad Company is a corporation, existing by virtue of the laws of the State of Oregon, and engaged in operating a line of railroad from Detroit on the East to the Yaquina on the West, in the State of Oregon, and has been so engaged during the period mentioned in plaintiff's Complaint.

II.

Denies that the line of railroad so, or at all, operated by defendant company runs through or traverses certain or any tracts of timber land in said State belonging to or adjacent to lands belonging to the plaintiff herein, commonly or at all known as the Cascade Forest Reserve.

III.

Denies that said defendant company operated its said, or any line of railroad in a careless or negligent manner, or that said defendant company on or prior to the 23d day of July, 1906, or at any other time carelessly or negligently failed or neglected to remove from its right of way or any right of way, where the

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same traverses or passes through the timber land in the State of Oregon, or elsewhere, belonging to or adjacent to lands belonging to the plaintiff, commonly or at all known as the Cascade Forest Reserve, as aforesaid, or at all, debris or inflammable material or any material consisting of dead or dry trees or logs, or grass, or old ties, or other dead or dry vegetable matter, or either or any of them, or carelessly or negligently or at all, failed or neglected to keep its, or any right of way in said, or any places, clear of such or any trees or logs, or grass, or old ties, or dead or dry vegetable matter or either, or any of them, or carelessly or negligently permitted or allowed large, or any quantities of dead or dry trees, or logs, or grass, or old ties, or other dead or dry vegetable matter to accumulate along the right of way of said defendant's railroad or elsewhere, where the same traverses or passes through said or any tracts of timber land aforesaid, or at all, or well knowing that by reason of its said or any carelessness or negligence, great or any danger existed that a fire or fires might be started from sparks or cinders or either, from any of its engines, being run over said road, or from burning matches or cigar stubbs, or either, that might be thrown from any of the trains running over said road, or passing through said or any tracts of land, or that the defendant was notified or requested, or either, on or about the 24th of April, 1906, or any other time to remove said, or any, debris or inflammable material or either, from said right of way, or to prevent the accumulation of the same thereon by plaintiff's Forest Inspector located in Portland,

Oregon, or elsewhere.

IV.

Denies that on or about the 11th day of August, 1906, or at any other time said defendant, or its agents or servants or employees, or either, ran or operated an engine drawing a train or any cars over its said track or right of way, where the same traversed or passed through said, or any, tracts of timber land hereinbefore, or at all described, or said defendant or its agents or servants or employees or either or any of them, then or there negligently or carelessly operated or ran said engine, or negligently or carelessly permitted or allowed the same to be out of repair, or negligently or carelessly or at all failed or neglected to equip said engine with spark arresters or apparatus to prevent the escape of sparks or cinders or coals or fire, or either or any of them, or carelessly or negligently placed said engine in charge of, or in control of, unskillful employees or servants or either, or by reason of said or any carelessness or negligence, or either, of said defendant company in failing or neglecting to remove from its track or right of way, or to keep the same free or clear of dead or dry leaves or logs, or grass or old ties, or other dead or dry vegetable matter, as aforesaid, or at all, or by reason of the accumulation thereof upon its track or right of way, or either, or the careless or negligent management or operation of its said engine, or in carelessly or negligently permitting said or any engine to be out of repair, or carelessly or negligently failing to equip said engine with apparatus to prevent the escape of fire or sparks or cin-

ders, or said engine being then operated upon or run over said line of railroad by said defendant company, as aforesaid, scattered large, or any quantities of sparks, or fire, or burning cinders, or either, upon or along said railroad track or right of way of the defendant, or started a certain fire upon said right of way, or which said fire spread from said right of way to or upon said tracts of timber land owned by or belonging to plaintiff, or that said fire was started on said right of way, or spreading as aforesaid, or at all, burned or destroyed 12,961,000 feet, or any number of feet, board measure, of merchantable or other timber belonging to plaintiff of the reasonable, or any value of \$9,928.50 or any other amount; or 4,464,000 or any other number of feet, board measure, of the reasonable or any value of \$1.25, or any other amount per thousand feet; or 8,497,000, or any other number of feet, board measure, of the reasonable, or any value, of 50¢, or any other amount per thousand feet; or that because of the said, or any, fire so started as aforesaid, or at all, plaintiff was put to an expense for fighting the same or keeping said or any fire from spreading and destroying other valuable, or any timber, belonging to plaintiff in the manner or the amount as follows, or at all; or for extra or any labor, \$49.75, or any other amount; or for transportation or travel or either, \$2.65, or any other amount; or thereby plaintiff suffered damages in the sum of \$9,880.90, or any other amount whatever in the manner hereinabove alleged or at all.

This defendant, for a further and separate answer and defense to the first cause of action set out in

plaintiff's complaint, alleges:

That on the 23d day of July, 1906, and for a long time prior thereto, the defendant was using only one engine on the railroad of the defendant along the line of its road mentioned and referred to in plaintiff's complaint, which said engine made one trip daily from Albany to Detroit and return, arriving at Detroit about the hour of 12 o'clock M. and leaving Detroit about 1 o'clock P. M.

That said engine was in charge of a careful, capable, skillful and prudent engineer together with a careful, capable and skillful fireman who were operating and did operate said engine on said day and at all times before and after, in a careful, skillful and prudent manner.

That at said time and for a long time prior to said time said engine was finished with *a* most approved spark-arresters known and in practical use provided with wire screens and the same were in perfect order and so managed that no sparks could or did pass through the screens or spark-arresters, and that said engine was supplied with coal-boxes or ash-pans of the most approved pattern and the one in general use on railroad engines used for like purposes, and that said coal-box or ash-pan was in perfect condition, and that the fire mentioned in plaintiff's complaint could not, and did not, originate from the sparks emitting from the defendant's engine, or from the coal-box or ash-pan, or from coals being dropped by defendant's engine through the coal-box or ash-pan attached thereto.

This defendant for a second and further answer to

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the first cause of action set out in plaintiff's complaint alleges:

That the fire mentioned and described in plaintiff's Complaint as having occurred on the 23d day of July, 1906, did not start or originate on the defendant's right of way, but started upon lands outside of and away from defendant's right of way and upon lands that did not belong to the defendant, and defendant alleges that said fire originated in and near a cabin a short distance from the right of way of this defendant's railroad, which said cabin was frequently used by persons hunting and fishing, for camping purposes, and that the same had been so used immediately before the fire mentioned in plaintiff's first cause of action.

This defendant for a further and separate answer to the second cause of action set out in plaintiff's amended complaint, alleges:

That on the 11th day of August, 1906, and for a long time prior thereto, the defendant was using only one engine on the railroad of the defendant along the line of its road mentioned and referred to in plaintiff's complaint, which said engine made one trip daily from Albany to Detroit and return, arriving at Detroit about the hour of 12 o'clock M. and leaving Detroit about 1 o'clock P. M.

That said engine was in charge of a careful, capable, skillful and prudent engineer together with a careful, capable and skillful fireman who were operating and did operate said engine on said day and at all times before and after, in a careful, skillful and prudent manner.

That at said time, and for a long time prior to said time, said engine was finished with the most approved spark-arresters known and in practical use provided with wire screens, and the same were in perfect order and so managed that no sparks could or did pass through the screens or spark-arresters, and that said engine was supplied with coal-boxes or ash-pans of the most approved pattern and the one in general use on railroad engines used for like purposes, and that said coal-box or ash-pan was in perfect condition, and that the fire mentioned in plaintiff's complaint could not, and did not, originate from the sparks emitting from the defendant's engine, or from the coal-box or ash-pan, or from coals being dropped by defendant's engine through the coal-box or ash-pan attached thereto.

That the fire mentioned and described in plaintiff's amended complaint as having occurred on August 11, 1906, did not originate or start on the defendant's right of way or near defendant's right of way, but started upon lands not belonging to the defendant, but at some distance away from defendant's right of way and from causes unknown to this defendant.

This defendant further alleges that where said fire started on or about the 11th day of August, 1906, that a smoldering fire had been burning in some old logs some distance from the right of way and had been emitting smoke therefrom for several days prior to the said 11th day of August, 1906, and that defendant alleges that said fire originated from said smoldering fire in said dead logs that had been ignited on the 23d day of July, 1906, which said fire had not been extinguished.

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That the said fire of August 11, 1906, did not originate upon the defendant's right of way or near the same, or from any sparks emitted from its said engine or from any coals dropped through its ash-pan, or from any other cause connected with its said engine or train.

Wherefore defendant asks for a judgment that plaintiff's complaint be dismissed and for its costs and disbursements to be taxed and allowed.

W. D. FENTON and
J. K. WEATHERFORD,
Attorneys for Defendant.

State of Oregon,
County of Linn,—ss.

J. K. Weatherford, being first duly sworn, *says* I am the vice-president of the deft. company herein and know the contents of the foregoing answer, and that the same is true as I verily believe. The reason I make this affidavit is ———.

J. K. WEATHERFORD.

Subscribed and sworn to before me this 8th day of June, 1909.

[Seal]

WM. D. FENTON,
Notary Public for Oregon.

State of Oregon,
County of Multnomah,—ss.

I, John McCourt, do hereby acknowledge due and legal service on me in person, as the attorney for the United States herein, in Multnomah County, Oregon, on the 8 day of June, 1909, of a duly certified copy

of the within complaint filed by the defendant in the above-entitled cause.

JOHN McCOURT,
U. S. Attorney.

Answer to Amended Complaint. Filed June 8,
1909. G. H. Marsh, Clerk.

And afterwards, to wit, on the 18th day of June, 1909,
there was duly filed in said court, a Reply, in
words and figures as follows, to wit:

*In the Circuit Court of the United States for the Dis-
trict of Oregon, Ninth Judicial Circuit.*

No. 3164.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY (a Corporation),
Defendant.

Reply.

The United States of America, plaintiff herein, by
John McCourt, United States Attorney for the Dis-
trict of Oregon, replying to the answer of defendant
herein, denies as follows:

I.

Denies each and every allegation contained in de-
fendant's further and separate answer and defense
to the first cause of action set out in plaintiff's com-
plaint herein.

II.

Denies each and every allegation contained in de-
fendant's second and further answer to the first cause

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of action set out in plaintiff's complaint herein.

III.

Denies each and every allegation contained in defendant's further and separate answer to the second cause of action in plaintiff's amended complaint herein.

Wherefore plaintiff having fully replied to defendant's answer herein, demands judgment against the defendant in accordance with the prayer of its complaint herein.

JOHN McCOURT,
United States Attorney for Oregon.

United States of America,
District of Oregon,—ss.

I, John McCourt, being first duly sworn, on oath depose and say that I am United States Attorney for the District of Oregon, that the foregoing Reply is true as I verily believe.

JOHN McCOURT.

Subscribed and sworn to before me this 9th day of June, 1909.

[Seal]

J. R. WYATT,
Notary Public for Oregon.

United States of America,
District of Oregon,—ss.

Due, legal and timely service of the within Reply is hereby accepted at Portland, Oregon, this —— day of June, 1909.

_____,
Attorneys for Defendant.

Reply. Filed June 18, 1909. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 21st day of March, 1910, the same being the 144th judicial day of the regular October, 1909, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Minutes—Trial—March 21, 1910.]

In the Circuit Court of the United States for the District of Oregon.

No. 3164.

March 21, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
CO.

Now, at this day, come the plaintiff, by Mr. John McCourt, United States Attorney, and the defendant by Mr. William D. Fenton and Mr. J. K. Weatherford, of counsel. And this being the time set for the trial of this cause, now come the following named jurors to try the issue joined, viz.: John A. Newell, William C. Lawrence, Schuyler C. Priestly, James O. Spencer, John C. Paulson, George H. Thomas, Lawrence Strand, L. H. Andrews, George Tapfer, Henry W. Prettyman, William Mast, Charles E. Osborne, twelve good and lawful men of the District, who being accepted by both parties and duly empanelled and sworn, proceed to hear evidence adduced. And the hour of adjournment having ar-

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rived, the further trial of this cause is continued to to-morrow, Tuesday, March 22, 1910, at 10 o'clock A. M.

And afterwards, to wit, on Tuesday, the 22d day of March, 1910, the same being the 145th judicial day of the regular October, 1909, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[**Minutes—Trial—March 22, 1910.**]

In the Circuit Court of the United States, for the District of Oregon.

No. 3164.

March 22, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY.

Now, at this day, come the plaintiff by Mr. John McCourt, United States Attorney, and the defendant by Mr. William D. Fenton, and Mr. J. K. Weatherford, of counsel. Whereupon, the jury empanelled herein being present and answering to their names, the trial of this cause is resumed. And said jury having heard evidence adduced, and the hour of adjournment having arrived, the further trial of this cause is continued to to-morrow, Wednesday, March 23, 1910, at ten o'clock A. M.

And afterwards, to wit, on Wednesday, the 23d day of March, 1910, the same being the 146th judicial day of the regular October, 1909, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Minutes—Trial—March 23, 1910.]

In the Circuit Court of the United States for the District of Oregon.

No. 3164.

March 23, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY.

Now, at this day, come the plaintiff by Mr. John McCourt, United States Attorney, and the defendant by Mr. William D. Fenton, and Mr. J. K. Weatherford, of counsel. Whereupon, the jury empanelled herein being present and answering to their names, the trial of this cause is resumed. And said jury having heard evidence adduced, and the hour of adjournment having arrived, the further trial of this cause is continued to to-morrow, Thursday, March 24, 1910, at ten o'clock A. M.

And afterwards, to wit, on Thursday, the 24th day of March, 1910, the same being the 147th judicial day of the regular October, 1909, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Minutes—Trial—March 24, 1910.]

In the Circuit Court of the United States, for the District of Oregon.

No. 3164.

March 24, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY.

Now, at this day, come the plaintiff by Mr. John McCourt, United States Attorney, and the defendant by Mr. William D. Fenton and Mr. J. K. Weatherford of counsel. Whereupon, the jury empanelled herein being present and answering to their names, the trial of this cause is resumed. And said jury having heard evidence adduced, and the hour of adjournment having arrived, the further trial of this cause is continued to to-morrow, Friday, March 25, 1910, at ten o'clock A. M.

And afterwards, to wit, on Friday, the 25th day of March, 1910, the same being the 148th judicial day of the regular October, 1909, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Minutes—Trial—March 25, 1910.]

*In the Circuit Court of the United States, for the
District of Oregon.*

No. 3164.

March 25, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY.

Now, at this day, come the plaintiff by Mr. John McCourt, United States Attorney, and the defendant by Mr. William D. Fenton and Mr. J. K. Weatherford, of counsel. Whereupon, the jury empanelled herein being present and answering to their names, the trial of this cause is resumed. And said jury having heard evidence adduced, and the hour of adjournment having arrived, the further trial of this cause is continued to Monday, March 28, 1910, at ten o'clock A. M.

And afterwards, to wit, on Monday, the 28th day of March, 1910, the same being the 150th judicial day of the regular October, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Minutes—Trial—March 28, 1910.]

*In the Circuit Court of the United States, for the
District of Oregon.*

No. 3164.

March 28, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY.

Now, at this day, come the plaintiff by Mr. John McCourt, United States Attorney, and the defendant by Mr. William D. Fenton and Mr. J. K. Weatherford, of counsel. Whereupon, the jury empanelled herein being present and answering to their names, the trial of this cause is resumed. And said jury having heard all the evidence adduced, the arguments of counsel, and the charge of the Court, retire in charge of proper, sworn officers to consider of their verdict.

And afterwards, to wit, on Tuesday, the 29th day of March, 1910, the same being the 151st judicial day of the regular October, 1909, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Minutes—Judgment, etc.—March 29, 1910.]

*In the Circuit Court of the United States, for the
District of Oregon.*

No. 3164.

March 29, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY.

Now, at this day, come the plaintiff by Mr. John McCourt, United States Attorney, and the defendant by Mr. William D. Fenton, of counsel. Whereupon, the jury empanelled herein being present and answering to their names, said jury return into court the following verdict, viz.:

“We, the jury in the above-entitled cause, find for the plaintiff and against the defendant, and assess the damages at the sum of \$4,422.38, Four Thousand Four Hundred Twenty-two and 38/100 Dollars.

J. A. NEWELL,
Foreman.”

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—which verdict is received by the Court and ordered to be filed.

And thereupon, on motion of said plaintiff for judgment upon said verdict, it is considered that said plaintiff do have and recover of and from said defendant said sum of Four Thousand Four Hundred and Twenty-two and 38/100 (4,422.38) dollars, together with its costs and disbursements herein, taxed at \$724.21, and that execution issue therefor. And on motion of said defendant, IT IS ORDERED that said defendant be, and it is hereby, allowed ten days from this date within which to file a motion to set aside the judgment and for a new trial herein. And upon motion of the defendant, IT IS FURTHER ORDERED that said defendant be, and it is hereby, allowed to withdraw from the files Defendant's Exhibit "A" herein.

And afterwards, to wit, on the 29th day of March, 1910, there was duly filed in said court a Verdict, in words and figures as follows, to wit:

[Verdict.]

*In the Circuit Court of the United States, for the
District of Oregon.*

UNITED STATES,

Plaintiff,

vs.

CORVALLIS & EASTERN RAILROAD COM-
PANY,

Defendant.

We, the jury in the above-entitled cause, find for the plaintiff and against the defendant and assess the damages at the sum of \$4,422.38, Four Thousand Four Hundred Twenty-two and 38/100 Dollars.

J. A. NEWELL,
Foreman.

Verdict. Filed March 29, 1910. G. H. Marsh,
Clerk.

And afterwards, to wit, on Friday, the 8th day of April, 1910, the same being the 160th judicial day of the regular October, 1909, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

**[Order Extending Time to File Motion to Set Aside
Judgment, etc.]**

*In the Circuit Court of the United States, for the
District of Oregon.*

No. 3164.

April 8, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS & EASTERN RAILROAD COM-
PANY.

Now, at this day, come the plaintiff by Mr. Walter H. Evans, Assistant United States Attorney, and the defendant by Mr. Ben C. Dey, of counsel. Where-

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upon, on motion of said defendant, IT IS ORDERED that the time heretofore allowed said defendant within which to file a motion to set aside the judgment and for a new trial herein, be, and the same is hereby extended ten days from April 8, 1910, and that the same time be allowed said defendant to submit a bill of exceptions.

And afterwards, to wit, on Thursday, the 18th day of April, 1910, the same being the 4th judicial day of the regular April, 1910, term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Order Extending Time to File Motion to Set Aside Judgment, etc.]

In the Circuit Court of the United States, for the District of Oregon.

No. 3164.

April 18, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS & EASTERN RAILROAD COMPANY.

Now, at this day, come the plaintiff by Mr. John McCourt, United States Attorney, and the defendant by Mr. James E. Fenton, of counsel. Whereupon, on motion of the defendant, IT IS ORDERED that the time heretofore allowed said defendant

within which to file a motion to set aside the judgment and for a new trial herein be, and the same is hereby, extended to May 15, 1910, and that the time within which said defendant is required to submit a bill of exceptions herein, be and the same is hereby extended to May 15, 1910.

And afterwards, to wit, on Friday, the 13th day of May, 1910, the same being the 29th judicial day of the regular April, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Order Extending Time to File Motion to Set Aside Judgment, etc.]

In the Circuit Court of the United States, for the District of Oregon.

No. 3164.

May 13, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY.

Now, at this day, come the plaintiff by Mr. John McCourt, United States Attorney, and the defendant by Mr. Ben C. Dey, of counsel. Whereupon, on motion of the defendant, IT IS ORDERED that the time heretofore allowed said defendant within which to file a motion to set aside the judgment and for

a new trial and to submit a bill of exceptions herein be, and the same is hereby, extended thirty days.

And afterwards, to wit, on Friday, the 3d day of June, 1910, the same being the 46th judicial day of the regular April, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Order Extending Time to File Motion for New Trial, etc.]

In the Circuit Court of the United States, for the District of Oregon.

No. 3164.

June 3, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY.

Now, at this day, on motion of Mr. William D. Fenton, of counsel for the defendant, IT IS ORDERED that the time heretofore allowed said defendant within which to file a motion for a new trial and prepare and submit a bill of exceptions herein be, and the same is hereby, extended to and including the 15th day of July, 1910.

And afterwards, to wit, on Tuesday, the 12th day of July, 1910, the same being the 78th judicial day of the regular April, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Order Extending Time to File Motion for New Trial, etc.]

In the Circuit Court of the United States, for the District of Oregon.

No. 3164.

July 12, 1910.

UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY.

Now, at this day, on motion of Mr. Ben C. Dey, of counsel for the defendant, IT IS ORDERED that said defendant be, and it is hereby, allowed thirty days' further time within which to file a motion for a new trial and within which to prepare and submit a bill of exceptions herein.

And afterwards, to wit, on Thursday, the 11th day of August, 1910, the same being the 104th judicial day of the regular April, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Order Extending Time to File Motion for New Trial, etc.]

In the Circuit Court of the United States, for the District of Oregon.

No. 3164.

August 11, 1910.

THE UNITED STATES OF AMERICA

vs.

CORVALLIS AND EASTERN RAILROAD
CO.

Now, at this day, on motion of Mr. Ben C. Dey, of counsel for the defendant in the above-entitled cause, IT IS ORDERED that said defendant be, and it is hereby, allowed thirty days' further time within which to prepare and submit a bill of exceptions herein, and to file motion for a new trial herein.

And afterwards, to wit, on Saturday, the 10th day of September, 1910, the same being the 130th judicial day of the regular April, 1910, term of said court—Present, the Honorable ROBERT

S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Order Extending Time to File Motion for New Trial, etc.]

In the Circuit Court of the United States, for the District of Oregon.

No. 3164.

September 10, 1910.

UNITED STATES OF AMERICA

vs.

THE CORVALLIS AND EASTERN RAILROAD
COMPANY.

Now, at this day, come the plaintiff by Mr. John McCourt, United States Attorney, and the defendant by Mr. Wm. D. Fenton, of counsel. Whereupon, on motion of said defendant, IT IS ORDERED that the time heretofore allowed said defendant within which to present its bill of exceptions and to file a motion for a new trial herein be, and the same is, hereby extended to and including the first Monday of October, 1910.

And afterwards, to wit, on the 9th day of November, 1910, there was duly filed in said court, a Bill of Exceptions, in words and figures as follows, to wit:

[Bill of Exceptions.]

*In the Circuit Court of the United States, for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CORVALLIS AND EASTERN RAILROAD COM-
PANY,

Defendant.

Be it remembered that on March 21, 1910, this cause came on for hearing before Hon. R. S. Bean, Judge of said court, and a jury duly empanelled and sworn, plaintiff appearing by United States Attorney, John McCourt, and the defendant appearing by its attorneys, Wm. D. Fenton and J. K. Weatherford.

[Testimony of O. E. Haring, for Plaintiff.]

Whereupon the plaintiff, to support the issues in its behalf, called O. E. HARING as a witness, who being first duly sworn testified as follows:

Direct Examination.

He is draftsman in the Forest Service, located at Portland, and made the map hereinafter identified and admitted in evidence as Government Exhibit 1, showing the approximate location of the Corvallis and Eastern Railroad running east from Albany, or east of where it penetrates the boundaries of the Cascade Forest Reserve, and that he located upon that map the right of way of the railroad, the patented and public lands, and the approximate loca-

(Testimony of O. E. Haring.)

tion of the fire or burned area around it; that he obtained his information as to the public and deeded lands from the Land Office in the Worcester Building in Portland, Oregon; by public lands he means lands owned by the United States.

Whereupon counsel for plaintiff propounded to the witness the following question:

Q. Did you attempt, in locating places upon the map, did you locate them accurately, or how did you get the information?

Whereupon counsel for defendant objected to the same as incompetent, irrelevant and immaterial, and objected to any testimony for the reason that the complaint does not state facts sufficient upon which to base an action either for the first or second causes of action.

Which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed and saved as to all that class of testimony, and to any testimony.

Whereupon the witness further testified as follows:

That he got the information as accurately as possible from records supplied by Mr. Cahoon and men who made examinations; got the information as to the location of Berry Postoffice and the logging camp from men connected with the Oregon Forest Reserve, who had been through the country and located them for him where they knew the line, crossings of sections; located the line of railroad from the Land Office plats.

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(Testimony of O. E. Haring.)

Whereupon counsel for plaintiff offered in evidence said Government Exhibit 1, principally for reference and further use as for illustration by witnesses.

Whereupon said witness further testified that the map is correct as to the condition of land, being deeded or public land; public land is colored pink, and the deeded land is the shaded area, that is, the area with lines running through it; which said map is hereto attached and made a part of this Bill of Exceptions, and marked Plaintiff's Exhibit 1.

[Testimony of Charles B. Merrick, for Plaintiff.]

Whereupon CHARLES B. MERRICK was called as a witness on behalf of plaintiff, who being first duly sworn testified as follows:

Direct Examination.

He is Register of the United States Land Office at Portland, as such officer has the custody of the tract and plat books in the Oregon City Land District, and has compared the records with reference to the pink portions of that map, Exhibit 1, comparing it with lands still open to entry.

Whereupon counsel for plaintiff asked said witness the following question: Q. And that land indicated there in pink is public lands as shown by your record?

To which counsel for defendant objected on the ground that the same is not the best evidence and not the method by which plaintiff can prove title to its lands; that the complaint in this case does not

(Testimony of Charles B. Merrick.)

state what particular lands the plaintiff owns, or where the fire occurred, but says: "Along the lands of plaintiff in the Cascade Forest Reserve"; that the complaint is silent as to the description and location of the lands, and is silent also as to the particular engine, and that plaintiff is seeking to prove title by parole, but the defendant not objecting that the plaintiff does not produce the books, and that the testimony may go in as though the books were brought from the Land Office, and on the theory that witness has the tract books before him.

Which objections were and each thereof was overruled, to which ruling the defendant then and there excepted, which exception was allowed, it being considered that the tract books were offered and admitted in connection with the testimony of the witness.

Whereupon said witness further testified that he had made a comparison and found that the sections indicated, or subdivisions indicated by the pink were public lands, with two exceptions, that is, there is no record of Section 16, and it is assumed to be state land, section 16, 10 south and 5 east, and this was school land, but they have no record of it; did not examine his records to see if any lieu lands selection had been made releasing that to the United States; there had been some grants in that section, some homesteads granted, but no vacant lands there were shown owned by the Government, in fact he paid no attention to it; he compared tract books with lands having lines through it, to determine whether

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(Testimony of Charles B. Merrick.)

or not that was shown to be patented or deeded lands by the record, and it was so shown.

Cross-examination.

That section 16 is not Government land, he did not discover that there was any part of it Government land, but assumed that it was State land, and that part of 16 ought not to be marked with color on it; there was a portion of the southeast quarter of 16 had been homesteaded evidently before it was granted to the State; what he examined on the map and compared particularly was the red or pink with the Government records, to show it was still Government land; that question mark was put on when the map arrived at his office, and he does not know what it means, he did not change the map at all; he found the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 16 did not belong to the Government, and they proceeded on the presumption that the land in 16 that had not been homesteaded or patented belonged to the State, there was no entry made opposite these sections, and he did not examine his lieu land record with reference to that.

[Deposition of Lloyd Whitman, for Plaintiff.]

Whereupon counsel for plaintiff read the deposition of LLOYD WHITMAN, taken pursuant to law at Bay City, Michigan, on Sept. 27, 1909, who being first duly sworn according to law, testified as follows:

His name is Lloyd Allen Whitman; 26 years old; married; living at Freeland, Saginaw County, Michi-

(Deposition of Lloyd Whitman.)

gan, and has lived there since April, 1908, when he returned from the west; lived in Oregon three years, was all over the State, but might say his last residence was at Salem; lived in Oregon in July and August, 1906, five miles west of Detroit, in the Santiam Canyon, on the Corvallis and Eastern Railroad, and was engaged in cutting cedar posts and telegraph and telephone poles at that time; lived with his father there, who died last March, since he returned to Michigan, his name was Oscar Whitman; the railroad terminates at Detroit; he knows the line of the Cascade Forest Reserve; the railroad enters but does not pass through the Cascade Forest Reserve; at point where they were, five miles west of Detroit, the railroad is upon the Cascade Forest Reserve.

Whereupon counsel for plaintiff asked said witness the following question:

Q. On or about the 23d day of July, 1906, did you observe any fire along and upon the right of way of the defendant railroad at a point west of Detroit? No answer.

To which counsel for defendant objected as a conclusion of the witness, and as immaterial; and also objected to the preceding question; which objections and each thereof were overruled, to which ruling the defendant then and there excepted, which exception was allowed.

Whereupon the witness further testified as follows: He would not swear that it was July 23d, 24th, or 25th, but it was about that time; when he first

(Deposition of Lloyd Whitman.)

saw evidences of fire along the defendant's right of way he was about twenty rods below what is called Granite Mountain Siding station; about an hour after the train went down they saw a large amount of smoke about a mile and a half or a mile from them; he was east of the smoke, between the smoke and Detroit, his father was with him; the train was going west that he saw, and it was about two o'clock in the afternoon; he went down to where the fire was at six o'clock in the evening; Mr. Bresser, the section boss, came down with his men and called to them; they thought before this that the section-men were burning off some stuff; they were not aware of what the law was at that time; Mr. Bresser called, and he went down with him; his father visited the fire, but he does not recollect whether his father went with him or not; the fire had not spread very much when they got down there, it was not very much, yet it had covered some area; for the purpose of ascertaining the origin of the fire, they looked it over, and found a tie had been burned in the center of the rails, and that the fire had run out to the end of the tie; some grass and logs were lying there together, and from there it had run up the embankment and spread; the fire had gone out of the tie, that is, it was only partly burned; it showed that it had burned and went out and from there run down on the grass on the embankment and thence into some logs; the logs were leaning against the embankment, and from there the fire spread in either direction; these logs and this grass were close to the

(Deposition of Lloyd Whitman.)

track, a few feet from the track; the right of way is not fenced there; could not state where the line of the Cascade Forest Reserve was, if he was there he could show every landmark, but three years makes quite a difference; a day or two later the fire certainly did spread upon the Forest Reserve, as he helped to fight it on the range; he assisted there in fighting that fire three days, but did not finally subdue it, but prevented it from spreading further; they got a larger crew, and he left the Government's employment at that time; he was working for the Government only in fighting fire; he was not in the Government employ at that time; he went over the right of way about the place where this fire started, perhaps once a week, perhaps not once in two weeks; they were over the right of way above there perhaps every day, and was familiar with the defendant's right of way between him and Detroit; the track was grown over with grass, and everything that grew was let grow; the grass, ferns and other material there grew between the tracks and between the rails, and also outside; it was all grass and fern around there, clear up to the rails and between them at places, but not at all points; had not taken any particular notice of the place where the fire started; did not observe any person passing along the right of way that day, except the train; had been over the right of way that day, but not as far as the fire was; the fire was 7 or 8 miles from Detroit when it started; could not say anything about the damage done to the Forest Re-

(Deposition of Lloyd Whitman.)

serve; on August 11th or about that time he observed the second fire along the defendant's right of way, it was east of the other fire, about three miles, and about four or four and a half miles from Detroit; could not state the hour he discovered that fire, it was just after the train went west; the train usually went about two o'clock in the afternoon; he was at his father's house when he discovered the fire and went up there immediately; when he first saw it it looked like a large one; the first one looked like a small fire; this was soon after the train went west; he saw the train go east to Detroit between ten and eleven o'clock; the heat and smoke was very great at that time; he entered into the smoke as far as possible, and found that the fire had burned close from the railroad and into some lumber piles that were there, and it seemed to him as though it had been spread from these into some board camps which had burned down; more than that he could not say as to where the fire originated; at the point where he was it showed that the fire was close to the track, closer there *of* anywhere, and that the fire had burned to those boards; the boards were burning and the fire had left the trail where it ran to those houses; the fire, he thinks, ran north of the track, the railroad made so many turns you could not tell direction; the wind was blowing the same direction the fire was going, that is, with the fire; this was on August 11th; the tracks were in the same condition as to combustible material as on July 23d, excepting where they had been burned over by the

(Deposition of Lloyd Whitman.)

first fire; that fire ran upon the Cascade Forest Reserve; he is unacquainted with the extent of the damage done to Government timber; this stuff that grew along close to the track was combustible; he had seen a railroad man light a cigar and throw the match down as late as nine o'clock at night as an experiment, and it took fire.

Whereupon counsel for plaintiff asked said witness the following question:

Q. Had you seen any other fires immediately prior to that?

Whereupon counsel for defendant moved to strike out the testimony of the witness in regard to another fire, and objected to said question as incompetent, irrelevant; which motion was denied, and the objections and each thereof overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness further testified;

That he had seen two small fires, one was a fire that he found burning between the rails; it started outside of the rails when he was on his way to the fire of August 11th, on the track where the train had just passed over.

Whereupon said witness further testified that on August 11th he had not been in the vicinity of that fire during the day, no closer than he lived to it, somewhere within a mile; this last fire, after it was through burning, covered altogether a very large area, he would think an area of several hundred acres, but he would be unable to say; it was upon

(Deposition of Lloyd Whitman.)

what he believed to be Government Cascade Forest Reserve; that is, they rented a house from the Government, and it burned everything on that land but the house.

Whereupon said witness, upon cross-examination, further testified that he went into the mountains in the neighborhood of the fire in the month of February, 1906, and his father went the same time he did, and into the house owned by the Government; there were no campers in that district that he knew of, occasionally fishermen camped there; these campers all took blankets with them, they would not go home at night, each party walking through that part of the country carried his own blankets with him; he never knew them to stop in the timber on the side of the railroad, or anywhere that night overtook them, they usually made either Gates or Detroit; Gates was 17 miles from Detroit; he could not say if night overtook them whether they might have stopped in the woods; he was working in cedar for themselves; the track ran through the land upon which they were; the land was in the Reserve, but had been homesteaded; the railroad passed through this land; they had no fires from their noon-day meal, they came home every noon, and he knew of no other people working in the cedar there; at least not this side of Berry; Berry was about three miles east, and was between Detroit and them; the first knowledge of the fire of July 23d was, they saw smoke rising from the track, he should judge it was about three o'clock, could not say how long the fire had been burning before they noticed it; when they

(Deposition of Lloyd Whitman.)

reached the fire it had covered considerable area; it had backed away from the track; the fires they saw had burned in the one, and one had burned out; naturally supposed that the fire burned from the track, as the fire was away from the track, and the wind was blowing away from the track; he had seen fires work backwards; the fire of July 23d covered quite a large area, the nearer the track the smaller the space it had burned over; that would be true if it had worked up against the wind, but believes it would have been some wider than where it came onto the track; the ferns and grass were dead, that is, in a dry condition; there were spots where water came down the mountain where the grass was a little greener; he cannot recall that there were any such springs very near where they saw the trail of fire; it was about three hours after they first noticed the fire that he reached the point; he does not think there were other people down there before they went, but could not say; the railroad company has no fence; does not know the width of the right of way at that point, or what the railroad company claims as the right of way; the fire of August 11th was quite large when he first noticed it; this was about two o'clock; he was near at home all day; spent the forenoon fishing in front of the house; two o'clock was the first that he noticed the fire; if there was as much smoke as when he did see the fire, he was in a position to have noticed the smoke; no one called his attention to the fire of August 11th; he and his father were together; his father did not go up with him; when he reached the fire it covered

(Deposition of Lloyd Whitman.)

a considerable area; found a pile of boards nearly burned up, small pile, possibly several hundred feet in the pile, a small pile, less than one thousand feet; does not remember if it was piled together, or if there were cross pieces in it; could not say whether it was placed in the ordinary manner of piling lumber from a mill; could not tell how many boards were there; they were partly burned, and he supposed it was fir timber, dry fir timber; he had passed by there before the fire, and it had been there all summer, so it must have been dry; when he reached the fire the buildings had all fallen down; these buildings were from one to two rods from the track, in the Reservation; the buildings were not inhabited, and could not say whether any campers or others were in the buildings; had been over the right of way several days before, near these buildings; was not familiar with the soil at that point; the vegetation, grass and ferns were about as dry where their residence was located, as upon the right of way; he believed that fire would catch very easily from sparks anywhere in that canyon; the experiment testified to by the witness was not by a section-man, but one of the railroad-men that was up there while the first fire was burning; he does not know of his own knowledge whether the fire started in the camps on August 11th, and worked back up to the railroad, or not; the wind was the same prior to his reaching the fire, he believed, but would not be positive; never took notice of the number of ravines in there, or whether the course of the wind changed perceptibly; the fire had burned in the fern and grass from the track to the pile of boards or lumber.

[Testimony of W. A. Hoover, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called as a witness W. A. HOOVER, who being first duly sworn testified as follows:

That he lives at Newport, Oregon, and is acquainted with the Corvallis and Eastern Railroad from the west line of the Cascade Forest Reserve on east, and that he lived at Hoover's Mill about 12 years, then at Detroit and Newport the balance of the time; was along the right of way of the railroad company in July, 1906, several times a year; two or three times in July, passed through there on the train; observed the condition of the right of way from what is known as the water-tank, on the east—some—during that time in July, 1906, and prior; the condition as to accumulation of combustible material could have been better, he supposed; he never took particular notice along the right of way down there on that part of the road, but it was quite dry then, more or less dry, grass and combustible material, some dry foliage, grass, small boughs that blow in on the track; passed along the railroad there July 23d, 1906; on the afternoon of that day started from Hoover's Mill to go to Portland, and took the train at Detroit at that time; rode on the rear of the train as usual, generally do, on the rear seat, seeing and taking in the scenery; know they stopped at the water-tank, and thinks they got water there; short time after they left there noticed a fire starting up aside a stump, probably a mile below the water-

(Testimony of W. A. Hoover.)

tank, and shortly after he noticed it, the train began to jerk as though it was going to stop, and that pleased him quite a bit; he went in the coach in the rear—the combination car—the smoker was in the rear; of course he was in the rear end, so he went into the coach and Mr. Johnson was in there—the line man of the C. & E. railroad; the train stopped in a few minutes and did not make any move to back up, and he looked ahead and saw they were taking up a camper's outfit, noticed they put on bedsprings first; they took that on and the train started; the fire started in a stump, on the west side of the stump; the area it had burned over at that time was not wider than that (illustrating) at the base, and tapered in toward the top, kind of leading in toward the top, not a quarter of the stump; the stump was about eight or nine feet from the track; he hardly knows when he next passed over the road there, it was along in October or the latter part of September, probably; he went up the track the next day or two, about July 25th; the morning of the 25th he went to Portland and came back on the 25th and went up to Detroit—but the morning that he went to take the train at Albany to come to Portland, he thought he would see some of the train men—felt interested in the fire and would like to have it put out; on the morning of the 24th he took the train at Albany to come to Portland, the train was at the depot, so he thought he would go over and see some of the train men and ask them to try and report this fire and have something done; he went back on the

(Testimony of W. A. Hoover.)

25th; the fire had gone on up the hill, he didn't see much of it, it was burning up the side of the mountain; would not know how much country it spread over, could not see off the train where it got to, the hill was steep there; he could see the fire burning on top; did not observe any other persons there; there were no buildings around there that had fire in them; the only people he saw were these campers, putting stuff aboard the train and went out, he supposed they got on; he does not know how far this fire was from Granite Mountain; his testimony all relates to the alleged fire of July 23d; this fire was between three quarters of a mile and a mile west of the water-tank, would not know the distance exactly; the map is not accurate in the location of places; he went up and down the right of way between Detroit and Albany four or five trips, maybe six; he does not know as he made any observation at that time whether or not the locomotives or engines of the defendant were throwing sparks shortly before the fire.

Whereupon said witness further testified upon cross-examination, as follows:

That he came down on July 23d, and was riding on the rear end of the cars, down below where this fire started, and when he passed saw the fire; it was quite a little blaze at the time he passed by; does not know how many people were camped there, quite a number got aboard the train, but he only saw two or three; they were about seven rails length from where this tree was afire, this stump, whatever it

(Testimony of W. A. Hoover.)

was, about two hundred or two hundred fifty feet, right around a short curve; does not know how long they were camping there, supposed they had been camping and fishing; do not know if they had a fire; they seemed to be moving out on that train; these people camped in an empty house there; this empty house was about thirty or forty feet from the railroad track towards the river, to the left, south side; the track there is on the north side of the river until you go down as far as Mill City, and that was about thirty or forty feet up from the railroad track, would not say exactly; have seen people camped there probably before, now and then—not very often—up this far; they did not camp there until they got up there below Detroit, and at Berry he had noticed some few; people fishing up and down the river from these various camps; there were no camps down there that far at that time, but there were camps down below Sower's camp; does not know if campers came up from Mill City; don't hardly know where they were logging, but they were logging west of Breitenbush River, he thinks, and they had quite a large camp up the Breitenbush River a little ways, but he would not know how many men; probably some traveled afoot, but they generally went by train; some might go from one camp to another afoot, some traveled up and down there on what is known as railroad bicycles, some few; July 23d was a dry, warm day; it is hard to say in what state of decay that stump was he saw afire, but should judge the tree had been cut down

(Testimony of W. A. Hoover.)

when the railroad was built, probably in 1890; it appeared quite solid, was a large stump, probably three or four feet in diameter, and the fire was on the west side of the track, that is, the railroad would go by the south side of the stump, and the fire was on the west side of the road; the train was running west, and it was on the north side; he did not notice the stump until after he had passed the point and looked back and saw the fire; he saw it as soon as they got opposite it or past it, it might have been twenty feet, maybe ten feet, would not just know; was traveling quite slow at the time he saw the blaze first, going probably ten or twelve miles an hour; ten, twelve or fifteen miles an hour; they were not running fast because just as we passed it the train began to jerk and slow up; soon they applied the air, began to stop to put the campers on; thought they had stopped to put out the fire, it made him feel pretty good, he felt interested.

Whereupon said witness upon redirect examination, further testified as follows:

That Sower's logging camp is probably a mile or a mile and a half east of Berry, and the tank is about four miles west of Berry, down the road; the water-tank is a little further than five miles from Sower's logging camp; thinks it is seven miles from Detroit to the tank; did not know these parties were camped in this house until the train stopped there, he saw them put on their outfit; this was about seven rail-lengths, thirty-foot rail, from where he saw the fire, right around a short curve on the opposite side

(Testimony of W. A. Hoover.)

of the track, the camp was on the left, and the fire was on the right; could not see anything to indicate that any of these people had been up near this stump; saw the fire seemed to be going up from under the roots of this stump and drawing up alongside of it, seemed to be a kind of draft; should judge the stump was more or less rotten or decayed, should judge the tree was cut down about sixteen years; the house was about thirty to forty feet from the track; there were two there, would not know which one they was in, but think the first one, nearest the track; this house was about 230 feet from the stump; it was some further from the stump than the people were, where they were getting on the train; is not sure if that house was destroyed by the fire, but does not think it was; think it burned northwest from there, up the hill.

Whereupon said witness, upon recross-examination, further testified that he went back up there after the fire, summer before last, walked past that stump, it is still there; does not know whether decayed on one side or not, did not look particularly, never went up close to it, just looked at it; this was last spring, a year ago.

[Testimony of H. M. Guthrie, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called H. M. GUTHRIE, who being first duly sworn testified as follows:

Direct Examination.

Lived at Corvallis, Oregon, laborer; was in the employ of the Forest Service in the Cascade Forest

(Testimony of H. M. Guthrie.)

Reserve in 1906; familiar with the right of way of the Corvallis and Eastern from the west line of the Cascade Reserve on east as far as Detroit, and farther; have been over the road several times; in July, 1906, was doing various things, in the Forest Service with headquarters at Detroit; on July 24th, 1906, was down near the water-tank and saw smoke before he went down there; took a shovel and mattock, and got on a speeder at Detroit, and after reaching there, went down as far as Mr. Whitman's place, and they told him that the fire was a little further down the track; there is a canyon there, and he could not see just where the fire was; found it burning up the side of the mountain; he went along the track and the fire was burning over a large area at that time; could not see as to where it had started at all, did not come to any definite conclusion; did not see anything that caused him to believe the fire started in any particular place; it was burning over about twenty acres at that time; he came down the railroad; he saw the fire burning over an area of what he would judge about twenty acres, on the side of the mountain there, on the north side of the track, burning over the hill; all the fire was going up the hill naturally with the draft of the wind, which was blowing up the canyon at the time, a very gentle breeze; does not know how it was blowing the day before; the fire had not burned the side of the railroad track near the river, it was not burning close to the track at any point when he was there, it had burned within thirty or forty feet, he should judge;

(Testimony of H. M. Guthrie.)

he did not observe any cinders or charcoal at that place, near the track, it was above there later, at another fire, he saw cinders and charcoal laying on the track; that was the fire of August 11th; he does not remember that his attention was called to where some parties had been camping, but he went to a cabin and saw evidence of where parties had been camped there quite recently, fresh fish heads and tails were in the camp; does not remember of any particular stump near the railroad track, there are numerous stumps along the right of way which possibly might have been charred, but doesn't remember of any particular stump, or any that was afire at the time he went through; the nearest point to this cabin of the line of fire was about between 50 and 100 yards; when he was down there the fire had not burned on the river side of the track at all; he stayed there about an hour, around the fire, then returned to Detroit and wired to Portland for assistance; went down again early next morning, and was endeavoring all the time to secure men to fight the fire; went down next morning with his camp outfit, met Mr. Shaw of the Curtis Lumber Company near there, who had brought out a number of men, and a bridge-man was there; thinks his name was Mr. Stevens, the bridge-man of the Corvallis and Eastern Railroad Company. Mr. Shaw offered to send any amount of men out of the mill, and said that he would endeavor to secure a special train from the C. & E. to send men to give him any assistance, and that afternoon the arrangements were

(Testimony of H. M. Guthrie.)

made—that evening—and the following morning men came up and they went in and fought the fire; on that afternoon Mr. Whitman and his son and he fought this fire as best they could, but it got away from them when the wind came up about two o'clock, and they couldn't handle it; he has no record of the area that was burned over there, or of the particular sections, or of the timber injured; assisted Mr. Cahoon in an examination afterwards, later in the Fall, of where it had burned; it was impossible to indicate the places where the fire had burned that started from that particular fire, because they never made any examination until some time in October, and this other fire which started on August 11th had burned together to this other fire, so it was all one burned area, the burn was all one; it wasn't solid in places, but it had run up the mountains in different places; he did not know the particular subdivision of land upon which the timber was burned, made no maps of it himself, simply helped to carry the chain and calipered timber for Mr. Cahoon, that is, he had a pair of calipers and would caliper trees, calling off to Mr. Cahoon, who put it down; he could not vouch for the correctness, but told him what the diameter was, but could not vouch for how they were put down, but reported to him correctly the measurements taken; he had not been down that far prior to the fire of July 23d, 1906, since April; he had been down the track close to that particular place, but had been down as far as Berry several times, and up on the track from Detroit the other

(Testimony of H. M. Guthrie.)

way; on August 11th had been over the track near the time the train came along; went down to Mr. Whitman's place on the morning of August 11th, and stamped some timber that had been sold to him by the Government, and returned to Detroit on the speeder probably half an hour ahead of the train, half or three-quarters of an hour, but does not know where the fire of August 11th was with relation to the track; saw the fire from Detroit; got the speeder and hastened down the track; when he got as far as Berry the fire was spreading so rapidly it was evidently beyond the control of man, and he assisted the residents of Berry in getting their household goods out of there, and took an invalid across the Breitenbush River on the speeder—a man that was not able to walk; as he passed ahead of the train there was no fire in sight of the right of way of the track of any kind; he was three-quarters of an hour ahead of the train; knew of an old board shack standing beside the track there, saw it as he passed by, but never saw anybody there as he went along, and saw no indication of fire in that cabin or around it or about it; there was lots of stuff that would burn along inside the 100 foot right of way, it was dry and inflammable at that time of the year; there were logs and limbs and grass—leaves, all of those things were inside the line; the grass was on the right of way—any amount of places; that is growing grass, and there was logs that came in close to the ends of the ties in some places; pieces of broken trees that had slid down the mountain and stopped right close

(Testimony of H. M. Guthrie.)

to the track; the grass was dry; noticed that section men of the company had cut the grass shortly before the first or second of these fires, and they used wet sacks and burned the area where they had cut along in places; they burned the grass that was left along the track; the section crew had allowed the grass to lay there and dry, but there was no grass along where this fire was; the first fire, as he remembers, was farther up the track, and the grass where the second fire started was grazed so close down, it was without any grass around there at all; there was a good many head of stock running right around there; noticed the engines of defendant, that drew the trains of defendant along the track that summer, and could not say if they were accustomed to throwing cinders or sparks that would set a fire along the right of way; knows that there were excursion trains run to Newport during the summer, and thinks they came up on every Sunday night, or every Saturday night during the summer months; don't remember just what month, but they threw sparks; pretty dark at nights when they would come up there, but, of course, when it was exceedingly dark he couldn't tell just how large those sparks would be, but never saw them start any fire; later when he went down after the fire had quit raging so fiercely along the creek, and had run up the mountains, on the

(Testimony of H. M. Guthrie.)

side, he went down the track as far as Mr. Whitman's place, and young Whitman took him and showed him where a coal or piece of charcoal was lying on a tie; he saw coal lying on a tie, a piece of charcoal lying on a tie; and there was a burnt place along the tie for a space of about eight inches between the rails, and the fire had burnt all around there on both sides of the track; it had burned out—it had burned on both sides of the track all along there, and in places it burned across the track; in places it burned the ties out; he was fighting the fire continually after the fire had started there; was around over the country a good deal, and assisted Mr. Cahoon for several days in determining the amount of timber that had been destroyed there; it was all done at the same time, he marked the rear end of the chain, and carried the calipers and measured the trees, and told him the diameter; Mr. Cahoon carried the front end of the chain and the compass, and would start on a given course, and would caliper all the trees two rods on each side of the chain; they calipered the trees that were burned, charred by fire; the smallest trees that they measured were eight inches in diameter, and they calipered the fire killed trees; measured everything, or estimated everything that was fire killed.

Whereupon said witness, on cross-examination, further testified as follows:

That he went down to the first fire on the afternoon of July 24th, about daylight; he was at Bald Mountain, about 17 miles east of Detroit; he first

(Testimony of H. M. Guthrie.)

met Mr. Whitman and his son when he got down there; Mr. Whitman did not seem to think that they could do anything in reference to the fire, and did not care to help to fight it that afternoon; he was very busy getting out some cedar posts at that time; he was at work getting out cedar posts right near the railroad track about three-quarters of a mile from this fire; he would not pass by where the fire was supposed to have started, in going to and from his house; he was working at these cedar posts right near his home; Young Whitman went down the track with him and then went back, but he does not remember that they attempted to show him where the fire started; some days after the fire was at its worst young Whitman pointed out where that charcoal was lying; it was lying on a tie near the middle of the track; the tie was burned along a little rotten place, right in a kind of groove in the grain, and it was checked there; that was rotten in the tie, and it had burned along this crack a ways; it had not burned entirely out to the edge of the tie, it had burned all around there from the end of the tie; there was nothing to indicate that it did not burn by the fire commencing there, or commencing some other place and burning back there, he never came to any opinion on that; this piece of charcoal he saw was about the size of the end of his thumb; it did not seem to be a dry piece of board like a piece of shingle or shake, or something of that nature, he just judged it to be a piece of burned fir; but could not tell what kind of piece of wood it came from; there

(Testimony of H. M. Guthrie.)

was a house standing above there a short distance, further than two or three rods; the house had burned, and he found pieces of this cinder or pieces of coal, dead coals, floating around there in different places; dropped in different places upon the track and upon the grass both towards the track and from it; that fire carried pieces great distances; talking to Mr. Whitman immediately when he first went down there; of course it was his business to ascertain if possible the source of any fire; Whitman seemed to be very skeptical, it was his opinion that the fire had been set on purpose, or to destroy his timber claims, so that the Curtis Lumber Company could buy it of him, he wanted a certain price, and they were trying to jew him down on price; he thought that by claiming the running of fire over it, he would have to sell it for a good deal less, and he would be loser; witness saw several different men during the summer who were going up in that country hunting, saw evidences of campers near this fire when he was down there, but never saw any at that time; when he made the examination of the timber he cruised everything down to eight inches in diameter, if he remembers correctly; he was not a cruiser himself, had not had any practical experience at that time; did not know what height he gave the trees, or anything of that kind; they had calipers used by the Forest Service, that has two arms that slide back and forth on a scale that is given in inches, and he would simply put these two arms on each side of the tree, and read

(Testimony of H. M. Guthrie.)

the number of inches or the diameter of the tree outside of the bark; the volume of the tree is taken from volume tables that are made in a given district; they scale a tree, a number of trees in a certain locality, and then take the diameter at breast height of that tree, and by measuring and scaling a great many trees, they make a volume table, which is approximately very correct; these trees that were burned—killed—were not entirely destroyed, the majority, in fact all of the trees, that they calipered were trees that were absolutely killed, the needles were all burned off where the fire had run right up, the tree itself was not consumed, they never any of them burn up that way unless they were dead; the trees were solid as far as fire was concerned; the trees were solid at the time they measured, because only the leaves were burned off, and the bark charred on the outside, the tree itself stood the same as before the fire; there were a few that were hollow in the butt, or rotten, of course had caught fire and burned down; no sound trees that were burned at all burned down; the fire could be hot enough to burn down a green tree, if there was favorable enough conditions; he has seen where green trees have burned down; there were trees that he is sure will burn down there that were perfectly green when the fire went through, possibly had pitch in them, and the fire would get in and stay with it until they would come down.

Whereupon said witness further testified on redirect examination as follows:

70 *The Corvallis and Eastern Railroad Company*
(Testimony of H. M. Guthrie.)

That the fire that started on July 23d—the members of the Forest Service quit fighting that fire August 6th, quit watching it; they did not measure any until late in October; no fire burned there at that time, it was snowing and raining; it was after the fire was at its worst, after it had reached its worst, he does not remember the exact date, but while he was fighting the fire that he talked with Whitman, saw this coal on the track; it was young Whitman, the son, that showed him where the fire was, where this coal was on the track; his father was not with him at the time; it was his father that was skeptical; Whitman made a statement that he, witness, wrote down on August 16th, copy of which he sent to Mr. Sherard, and reported it to Mr. Bronson, repeated it to Mr. Bronson, or read it out of his book; it was on July 24th when he had his first talk with young Whitman and his father, and later he secured this statement from Whitman, and wrote it down in his notebook; the only time he had a conversation with young Whitman alone was when young Whitman took him up and showed him where this place was where he thought the fire started, that coal on the track, and if witness remembers right, it was the fire of August 11th where he had put the fire out on his way up to where—when he saw this fire—this smoke—he started up to see where the smoke was coming from, and he noticed this coal along on the track, and the fire had burned out, that is, he stamped it out, and went on to the fire; the fire had burned it along there, and this was the time when young Whitman told him that he

(Testimony of C. D. Matheny.)

thought the Curtis Lumber people had set it afire to get his claim; it was the old gentleman's claim; the railroad was using fir wood in their engines at that time.

[Testimony of C. D. Matheny, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called C. D. MATHENY, who being first duly sworn, on direct examination testified as follows:

Lives at Gates, have lived in that part of the country, Gates and Detroit, about 16 years; knows the general location of the Corvallis and Eastern Railroad there, and was living there in July and August, 1906, at Berry, and had occasion during July and August of that year, and prior to that, to go up and down the right of way of the Corvallis and Eastern as far as the western boundary of the Cascade Forest Reserve.

Whereupon the witness was interrogated by counsel for plaintiff as follows:

Q. Did you observe during those trips and during that time the condition of the right of way as to being—as to the accumulation thereon of combustible material?

Whereupon counsel for defendant objected to the same as incompetent and immaterial, except as to the particular point where the fire originated, and the plaintiff has already designated where the fire originated.

Whereupon the Court ruled that the witness could testify, and that there would have to be particular

(Testimony of C. D. Matheny.)

inquiry later, as to whether at the place where the fire was.

Whereupon counsel for plaintiff further interrogated said witness, and said witness further testified as follows:

Q. The question is, did you observe the condition?

A. Yes, sir.

Q. What was that condition? Do you know about where—or rather, did you notice that condition west of what is known, or east of,—no, west of what is known as the water-tank?

Whereupon counsel for defendant objected to the same as immaterial, incompetent and irrelevant, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered and further testified as follows:

A. West of the water-tank?

Q. Or about where the fire of July 23d was said to have commenced?

A. Yes, sir.

Q. How is that?

A. Yes, sir, I was up there.

Q. What was the condition of the right of way along there?

Whereupon counsel for defendant renewed said objection last above set out, and made the further objection that witness should fix the time.

Whereupon the witness further answered, and was interrogated as follows:

Q. At the time shortly before the fire occurred.

A. Well, there was combustible matter, dry limbs,

(Testimony of C. D. Matheny.)

and grass and things like that on each side of the track, but on the right of way, that is, between the rails and along the track, and about where that fire originated, I think was reasonably clean.

Whereupon said witness further testified that this was right in the track, there was trash and limbs and broken logs and things like that right up in places along there within eight or ten or twelve feet of the track, but the immediate track was reasonably clean, but outside of that it was like in a great many other places through the timbered belt, it was not clean; the limbs were mostly dry, dead limbs, the grass at that place was mostly green, there was green grass along; it was shaded and timber along there mostly; the brush that he speaks of came from sliding down the mountain, it is right along the north side of the track a steep mountain; a tree will fall and the limbs and stuff will slide right down this mountain close to the track; it is on just a small flat there, and things falling from this side clear—slide down and accumulate along the track below; the condition of the track at or about where the fire touched the track, known as the fire of August 11th, near the old cabin, was pretty clean at that place, but on the north side of the track it rises up steep and has been logged off, and the grass there is pretty thick on that place, and a good many old tree tops where it had been logged—dry limbs, and along about June and July, facing the sun it gets dried, the grass is dry there, and that was the condition at that time, the grass and material were pretty dry; the grass had all died, nearly, by that time, fac-

(Testimony of C. D. Matheny.)

ing the sun, it was dry, and the grass turned white and it was very easy for fires to catch there, because it was open to the sun, it wasn't shaded; there was an old cook-house stood there, had been used by the Curtis Lumber Company; it was probably 20 feet from the track, the cabin about 40 feet; was along that right of way there in the vicinity of that cabin on the 11th day of August, 1906, and recalls a train coming up the track there that day; would judge that it was about an hour before the train came along that he was there near that cabin and cook-house; it had been a cook-house used by the Curtis Lumber Company, and had been vacant a good while; it was constructed of lumber; noticed those two structures there, was looking for cattle, and turned off the track at the cook-house, passed right by the front of it, went on a little bench right above the track to where the cabin stood, and walked right past the door of it; there was no one in any of these structures, and no fire of any character around there, and he put out no fire, that is, set out no fire, while he was there; went from there to Berry, a mile and three-quarters from that point, on foot, and afterwards noticed a fire about two o'clock in the afternoon, but did not go back down there a short time afterwards; did not see any campers or persons or other people in that vicinity when he went along there; he was around in the morning probably an hour; could not say how long that fire burned, nor how large a country it burned over; the fire was burning there for a week or ten days, and burned over an area of probably

(Testimony of C. D. Matheny.)

three or four miles square, but did not go out over the country to observe the injury done to the trees; noticed the engines of defendant during that summer, shortly before and shortly after this fire.

Whereupon counsel for plaintiff asked said witness the following question:

Q. State whether or not you observed them throwing sparks or cinders likely to set fire? About that time.

To which counsel for defendant objected, unless it referred to this particular day; which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

A. Yes, I did.

Said witness then further testified: that he knows he had observed them throwing sparks or cinders at different times along the road from there on up to Detroit.

Whereupon said witness further testified upon cross-examination, as follows:

That he now lives at Gates, and has been living there for about eight months; he is a blacksmith; at the time of the fire he was packing into the Hot Springs, had been packing into the Hot Springs a week or ten days; on August 11th he was at Berry living at Berry at that time, which is about three miles from Detroit, and about a mile or three-quarters from where this house stood that was burned up, he started to go down there on the 11th about eight or nine o'clock and he went on both sides of the track,

(Testimony of C. D. Matheny.)

looking for cattle; went down the track as far as the McRae cabin, which is the old cook-house spoken of by witness; did not go farther down that that; arrived about ten o'clock, no one with him; did not stop there, went back home to Detroit, took a little circle, found his cattle right back of where the old cabin burned, down near that cabin; as he went back, stopped and looked into that cabin; the front door next to the track, facing west was open; did not make any stop at all, hardly, just glanced into the cabin as he passed the door; did not look into the cook-house, passed the door, which was open, and did not go into it at all; does not know how many rooms it has, but it is a long building that had been there for a boarding-house, with quite a number of rooms, not more than four or five, no upstairs to it, and the building was up level with the railroad, and the cook-house too, level with the track; the dwelling-house stood—say 15 or 20 feet higher than the track, a little higher than the smokestack of the engine would have been; he did not see anybody there, did not see two fishermen fishing right along by that place at the time; seldom smoke, and did not smoke at that time; does not smoke very much, would say that he is not a smoker; noticed the fire about two o'clock, saw it himself, heavy smoke coming up from down that way attracted his attention; the wind was blowing from the west, and he saw the smoke rising, cinders flying; did not go down there then, did not go down at all, did not go down during the fire, not until the next day; was out fighting fire to help put it out; did not

(Testimony of C. D. Matheny.)

go down to where the cook-house is the next day, and don't remember how long it was after that, possibly a week after that; was at his house at Berry when he saw the fire, about one and a half miles away; the train went west about two o'clock, that is, left his place about two o'clock, and came up, going east, about eleven o'clock; he left down there about eleven o'clock and the train must have been right along near him when he passed this old house, he was right ahead of the train, but does not remember whether it beat him to Berry, or whether he beat it into Berry; does not remember on which side of the track he was when the train went by, and couldn't say whether it was a big, small or medium train, or the number of cars, it was a mixed train, with one passenger coach, he thinks, but don't know how many freight-cars; it stopped at Berry, but he was not there when it stopped, and don't remember where he was when the train got to Berry; the train did not pass him while he was down at that old house; he could not tell where he was when it passed, but he was way up near Berry; he knows he had to hurry to get his cattle up there, but don't remember whether he got out, or whether he went off into the river bottom before they got quite to Berry; the first he noticed smoke was about two o'clock, that would be about the time the train would get there going west; he knows of no one passing up and down there after he passed, there are a few people occasionally going up and down there all the while, and he went up and down himself some distance, quite often, and other people did the same;

(Testimony of C. D. Matheny.)

there are a good many loggers around that neighborhood; they were at work at that time, on the Breitenbush, at the mouth of the Breitenbush, but they were not up some distance above the mouth of the river, nor was there any camp running at the old Enterprise Mill; the camp was running at the mouth of the Breitenbush, and they were loading logs, a few logs, out of the pond at the old mill, but there was no camp running there; the old mill is about a mile from the mouth; there is no trail from the old mill above Berry; the people cannot come across very handy—no trail; he told some of the boys at home what he knew about this case, but don't remember who; did not talk to Mr. McCourt, nor write to him, nor talk to any of the Forest Reserve people, nor write to them; was asked to come down as a witness by United States Marshal; he did not ask him what he knew, and witness did not tell him what he knew, nor anybody, recently; a long time ago he told Mr. Bronson, who was the chief of the Forest Reserve at the time of this fire; he has nothing particular against the Corvallis and Eastern, has not been at outs with them, or talked against them.

Whereupon said witness on redirect examination further testified as follows:

That the place where those people were loading logs was about two miles from Berry; place not nearer to Berry than the cabin that burned; in going to Berry from that place where they were loading logs, they would not pass, in the ordinary course of travel, by these cabins at all, they would have to go

(Testimony of C. D. Matheny.)

right past Berry if they were traveling from the mouth of the Breitenbush; where they were loading logs was north and east, and where the cabins were was west, below Berry and on a line between them; in going to Berry they would go nearer to the cabin when they got to Berry than they would at any other point; after he discovered the fire he was getting his household goods out of the house into a place where they would be safe from fire and taken care of.

Whereupon said witness, upon recross-examination, further testified that Berry is quite a large flat, and most of the houses are on the south side of the track, or along near by on the railroad track, on both sides, and the flat extends considerably north of there up the Breitenbush River, but people could not very well pass through there without ever going down to what would be the business part of Berry; right at Berry they could, going down by the river; it is quite a little ways from Berry to the river on that side, but the river and bluff come together right on the track, they would have to come on the track near Berry; it is about 200 feet below the business houses or dwelling-houses; there are about 50 acres in that bottom land at Berry, and about 12 dwelling-houses all together at Berry; there is a group of them together, and the scattered out—some scattered out quite a little distance apart; he lived in the lower end of the town.

[Testimony of V. Matheny, for Plaintiff.]

Whereupon plaintiff, to further support the issues in its behalf, called V. MATHENY, who being first duly sworn testified as follows:

Direct Examination.

Lives at Gates; twenty years of age; has lived at Gates about six or seven months, and before that lived part of the time in Portland; was six months at Portland during the Spring of 1909, and lived at Berry in the summer of 1906, and knows generally the location of the right of way of the Corvallis & Eastern Railroad; was at Berry on August 11th, 1906; a few times during that summer, and prior to that date, had occasion to go up and down the right of way of the Corvallis & Eastern railroad, probably seven or eight times during the summer; the last time he was along probably between the 23d of July and the 8th of August—or the 11th of August; he went down the track as far as the western boundary of the Cascade Forest Reserve, and sometimes further, sometimes as far as Gates, sometimes walked, sometimes by velocipede, and on the train a number of times; some time between the 23d and the 4th of July, between the 4th and the 23d of July—he don't remember the exact date—he had been along there, he was along there a few days after he knew of the fire of July 23d, but he did not know of the fire at the time; at that time he was working at Hoover's Camp, about a mile east of Berry, just across the Breitenbush River; he could not say as to the condition of the right of way, as to the accumulation of combus-

(Testimony of V. Matheny.)

tible material thereon immediately before the fire, but had noticed it several times immediately before the fire of August 11th, and at the point it was supposed to have occurred, near those cabins there; there was a great deal of dry grass and fern on either side of the track, mostly on the north side, there was a great deal of dry limbs and fern and brush, he should say 10 or 12 feet right off the track—going east—on the north side of the track and right at this old McRae cabin and cook-house there was a great deal of old boards; had been an old bunk-house right at the east of this bunk-house—cook-house—pulled down, but the boards piled right up alongside the railroad track, within six feet of the end of the ties; a great deal of old rubbish, waste where the old bunk-house had been pulled down, and where the cook-house had stood, a great deal of old dry brush, chips, dry grass, ferns, and so on; saw that fire after it started, he was on the Corvallis & Eastern train, and he noticed it was between 1:30 and 2 o'clock; he was on the train when it went down, the first time he saw the fire; saw the smoke, noticed the smoke about one thirty, probably one o'clock, something of that kind, shortly before the train arrived in Berry going west in the afternoon, and it arrived at Berry say 1:45, or about that time; he boarded the train and went to Mill City; did not see anything as he passed the point where this cabin and cook-house had stood; they were burned down, saw only a fire; would say it had burned from there east three-quarters of a mile and probably a quarter or half a mile north up the side

(Testimony of V. Matheny.)

of the mountain; would say that the fire was between one-half and one-quarter, probably one-third of a mile; wind was blowing up the canyon from the west toward the east, a strong breeze; almost parallel with the track, very near it, anyway; the fire was apparently running with the wind, a little bit up the mountain; fire will run up a mountain—burn up; at the point where the fire started wind was blowing a little north of east, and the track ran almost east right at that point, making a curve around to the north a little further, so the wind was blowing at the fire almost—pretty near from the track, that is, a little north of parallel with the track; after he had passed there he went to Mill City, on down on the train, and came back on the work train, the relief train; the Curtis engine there sent back their train—engine and one car; it must have been 4:30 or five o'clock when they got back; at that time the fire was all over the country, all around there, that is, close to this vicinity; the train could not get any further back than this old bunk-house, or cook-house, where they had stood; above there in a place or two it had burned the track; at this point the fire was there close, the train could not get any further along than that; he got off the train and walked to Berry; he stopped only a few seconds, probably, he might have been there probably two or three minutes at that point, but walked right on from there up to Berry; he did not make any investigation around on that ground to determine how the fire had started, or where it had started, or anything of that kind, only

(Testimony of V. Matheny.)

noticed this pile of boards that had been pulled out from this old bunk-house after torn down, alongside of the track; most of it burned up except at one end, at one end a small bunch of boards, probably a foot long, left, otherwise nothing; would say that that bunk-house stood probably twenty feet north of the track—twenty-five feet, and the cabin stood between 35—30 or 40 feet, a little higher from the track; don't remember of any grass being cut down shortly before the fire, at that point, a great deal of standing grass, but dry.

Whereupon said witness further testified upon cross-examination as follows:

That he was twenty years, eleven months and ten days old, and was just past sixteen years when this fire occurred, sixteen the spring before, and had been working on the County road of Linn County; in 1906 had been working in a logging camp for the Curtis Lumber Company, and was working at Sower's Camp up a little above where he lives; had been working at Sower's Camp since the forepart of June, and went down to Mill City on the train that day to cash a time check; all the boys did not come down to Mill City to cash their time checks, and none of them that day; if you had a time check you had to cash it in Mill City, they could not cash it at Detroit, it was not transferable; most of the people working in the logging camps got paid in coin on the first of the month as a rule; did not particularly examine these places before the fire, but noticed a number of other places, was not particularly looking out for fire; this lumber

(Testimony of V. Matheny.)

pile and all this dry brush and stuff being so close to the track called his attention to it; they have places where they pile the logs next to the road, and lumber next to the railroad, so as to load them on there, and he supposed it is necessary to pile them off the side of the railroad track, and he had seen logs logged up close to the track for loading; he did not take particular notice of the point where they claimed the fire originated, down by the old bunk-house or cabin, not any more than he would at any other place; the last people that lived there, the man that owned the claim, was McRae, it was the McRae homestead, and was his home he lived in while he proved up; he believes he had proved up on this property and sold it afterward to the Curtis Lumber Company, and the Curtis Lumber Company logged it; don't know about their turning it back to the Government; part of the land is burned over; there was a great deal more burned over besides that, but don't know whether that was turned back to the Government, or whether that was Government land or not; he did not notice the situation especially on August 11th, but noticed the fire, and that it had burned everything around there, that is, almost everything, and that the fire was extending north and east along the railroad track, but could not say just how many acres it covered, when he came down on the train; would not say, a half section, probably 40 or 50 acres; at one place extended up the hill a quarter of a mile or more; don't think it had gone up the mountain that far, at the McRae's house; it had extended east about half a

(Testimony of V. Matheny.)

mile; had burned at one place on the south side of the railroad track, right at the upper end of the flat, at the Spaulding place, but had not done so at the McRae house, nothing across the track but the river, at the McRae cabin—not that he noticed; it had not burned anything there; the buildings there were known as the McRae cook house, but could not say that McRae was one of the earliest men in that country, he was there before witness came; the grass was dry, and fern was dry; fern turns dry pretty near any time after the forepart or the middle of July, in a dry year, in a locality such as that; there is no water very close around that locality, there was no spring up there; cattle grazed in there; do not know whether there was splendid feed in there at that time; the cattle fed all over, everywhere, and it was not especially good in there that he knew of; he did not go down and look for the cattle when they did not come home; the gentleman just on the witness-stand is his father, who would look for cattle at times; could not say as to how many times he found them grazing on that young grass in there, and don't remember whether he found them there on the day of the fire or not—as to that, he might; don't know how far up the hill that open land extended, where the grass was good and the cattle grazed; there is a small flat back of the McRae cabin, he would say two acres, an acre and a half, something like that, and that was all there was for the cattle to graze on, directly back of the cabin, right around the cabin; to the east of the cabin was a flat of some few acres, and it came right down

(Testimony of V. Matheny.)

to the river; there is the cut right there on the old railroad; could not say whether there was cattle there on August 11th, did not see any cattle at all, not looking for any; was not there to look for cattle; the train went right on to Mill City; could not say how fast the train went; saw those burned boards there about 4:45 or five o'clock, don't know just what time the train did go through; that was the same day; did not pay any particular attention to them, whether they were burned when he went down west, or not; noticed the fire had been burning, from all appearances, the way the wind was blowing—as though it started close to the cabins; at times it is a fact that the wind blows right up the canyon, sometimes the wind blows up the canyon; as a general rule the wind blows from the west; could not say how high the hill is just west of the McRae cabin, has never been to the top of it; a mountain that would take an hour's time to the top of it comes down to the river; hill does not go back to the left at the McRae cabin, and make quite a flat just back of it and extend gradually to the top; it is not so abrupt on the east side of the McRae cabin, otherwise just as steep if you start up, but not very much of a flat out there, it does not come down to the river on the east side, just the same as on the west; it comes down to within probably two or three hundred feet, maybe four hundred feet, of the track, don't know just how far; goes back three or four hundred feet east of the cabin, and right at the cabin it commences going back; does not know how far it continued, but the track makes a curve the same as the

(Testimony of V. Matheny.)

hill; the track does not follow right close to the river, at that point there is more flat on the opposite side of the river, between the track and the river than between the hill and the track, and you can drop a stone almost perpendicular down to the river right opposite McRae cabin, pretty near right at the cabin; there is just east of McRae's cabin quite a little bottom, probably ten acres, maybe not as much, maybe more, never measured; he does not think there was any fire at that point, the fire had not gotten hardly that far north; did not at that time go to the upper end of the fire, the north end, but since that he has and did in the winter of 1907, the spring of 1908, while hunting; has engaged in fishing and hunting up there, and some other people have also; have not gone very often through by McRae's cabin, up the mountain; not very many people at this point come in from outside at that end for the purpose of hunting and fishing, a few people come to Detroit, a great deal to Detroit; never saw anybody camping or stopping there for fishing at that particular point; a few people fish along the river, and very few hunt, a few fish up and down the river, one a month, something like that, maybe two, three, four or five, hardly think as many as twenty; a few pieces of these boards were left unburned on the west end of the pile; the railroad track runs almost east and west until it strikes the cabin, although there is a big curve in there, and he could not say the exact direction; it runs north of east, east of McRae's cabin; the track is almost straight at the cabin, running almost east and west; it turns going to

(Testimony of V. Matheny.)

the cabin, and then makes a reverse turn east of the cabin; the river makes a curve just before they get to the cabin—almost a horseshoe curve; right at the cabin the track is almost straight for a few hundred feet; just east of the cabin it makes a reverse curve the opposite way, that is, a reverse curve there to what it is on the west side of the cabin, but not a horseshoe bend at that particular point; he went back there in the evening with the Curtis Lumber Company; they had a train and took up a lot of people to fight the fire; got there about 4:45, maybe five o'clock, don't remember exact time of day; don't remember whether Mr. John A. Shaw was at the mill at Mill City, but believes he was; do not know whether railroad company sent these men, or whether the Curtis Lumber Company sent them; could not say what office Mr. Shaw held, but believes he held some office.

Whereupon said witness upon redirect examination further testified as follows:

That the Spaulding cabin is probably a quarter of a mile east of the McRae cabin, it was another McRae house; it used to be called an old McRae cabin; believes a man by the name of McRae sold it to a man by the name of Spaulding—something of the kind—Government property now; thinks it was the McRae place that had been logged off and the logs rolled down to the railroad track there below, but was not certain whether it was or not, that was logged at this time that they used this cook house; the brush or limbs that had been cut from these logs coming from

(Testimony of V. Matheny.)

the McRae place, had been left to lay on the ground, about 18 or 20 or 30 feet from the track, maybe closer.

Whereupon counsel for plaintiff asked said witness the following question:

Q. Did you notice in your trips up and down the track there the general condition of the right of way of the company?

To which counsel for defendant objected as incompetent.

Whereupon said objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

A. I had.

Whereupon said witness was further interrogated and testified over the said objection and exception of defendant allowed by the Court, as follows:

Q. What was it as to the accumulation of inflammable and combustible material? In other words, what did you observe along the right of way?

A. At this particular point, or everywhere?

Q. Near those points; generally between the west boundary of the Cascade Forest Reserve there and this fire of the 11th of August?

A. Oh, in almost any place along between the water-tank, close to the water-tank, where the west boundary of the Forest Reserve is, east, there is to be found plenty of brush; that is, close along the track—or either way, close up to the track; there is plenty of brush, fern, limbs—a few places there is logs.

Q. What was the condition of these limbs?

A. Dry at this time of the year.

(Testimony of V. Matheny.)

Q. Brush, grass and logs?

A. Dry at this time of the year.

Q. What sort of a summer had that been?

A. Very dry.

It is now here certified that all of the foregoing testimony was objected to upon the ground that it takes in the whole trackage, which objection the Court overruled, to which ruling the defendant then and there excepted, which exception was allowed.

Whereupon said witness upon recross-examination testified as follows:

That this brush was all kinds of distances from the track—from right up close to the track to within ten or fifteen feet, clear back from the track, some places closer, some places right up almost to the track in places; he noticed this brush close to the track during the summer of 1906; he went down there probably seven or eight times during the summer, sometimes on the train, sometimes walked, fishing, sometimes in other ways, sometimes by velocipede on the rails; when he went fishing went part ways on the track; the track was the main traveled thoroughfare through there, only road there to travel, except a man takes the trails out through the mountains; could not say whether anybody that went fishing up there smoked or not.

Whereupon said witness further testified upon re-direct examination as follows:

That the Curtis Lumber Company logged the McRae place, the lower McRae place, just east of these cabins, they logged east of them and right north of

(Testimony of V. Matheny.)

them too; one forty lies in there, they logged across, up into the Spaulding place—the west line of the Spaulding place, but don't know just how far.

Whereupon said witness upon recross-examination further testified as follows:

That Spaulding logged on the south side of the river, and the logs were shipped from about a quarter of a mile east; that was a good many years ago; Curtis Lumber Company logged *theirs* about 1902, maybe 1903, maybe a little later, maybe 1904.

Whereupon said witness upon redirect examination further testified:

That he did not know whether Spaulding or Shaw, either of them, was an officer of the Corvallis & Eastern Railroad.

[Testimony of Harry Dunlap, for Plaintiff.]

Whereupon plaintiff, to further support the issues in its behalf, called HARRY DUNLAP, who being first duly sworn, testified as follows:

Direct Examination.

He lives at Detroit, working in a lumber camp, running a donkey-engine most of the time; in 1906 was working for the Hoover Lumber Company at Hoover; in July of that year, but don't know whether in August or not; don't remember being down the railroad but once, and that was in April; was not down there after that until about the 24th or 25th of July, was not there the 23d; helped fight the fire one day not sure whether July 24th, 25th, or 26th, but it was right after the fire; was asked to fight the fire

(Testimony of Harry Dunlap.)

by the Hoover Lumber Company, but don't remember whether was hired by them or the Government, but got his money through the Hoover Lumber Company, if he remembers right; does not remember taking any particular notice on that trip down there to fight that fire of the condition of the right of way of the Corvallis & Eastern Railroad from McRae's place down to the water-tank, and could not say what the condition was as to accumulation of combustible material thereon right at that time, although it was not different from what it had been in April, excepting but one place; the condition in April of this camp that burned down, the section crew was clearing up a little around there, burning it off, otherwise any other place didn't see it had been touched—different than in April; there was brush, limbs, ferns, grass of all descriptions, logs, some places it come up breast high, otherwise tolerably clean around, from the point of the fire of August 11th down to the water-tank, along the right of way; in July, when he was there, it was dry, about as dry as it could be at that time of the year; it was a little overly dry year that summer; in April, 1906, was not doing *any* particular right at that time, Mr. Hayes came along one day, he was going down that way, and he asked him to go with him, so he went, and they came back; he did not do any particular thing; Mr. Hayes went down for the Government on business, went down to make a contract for some posts a party was making down there; Mr. Hayes took some pictures along the right of way while he was with him; he saw him take the

(Testimony of W. F. White.)

pictures of the right of way alongside of the track, brush in places, that is, where the brush was.

Whereupon defendant waived cross-examination.

[Testimony of W. F. White, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called W. F. WHITE, who being first duly sworn, testified as follows:

Direct Examination.

He resides at Detroit, and has so lived there since 1899, and was living in Detroit in 1906; recollects the instance of a fire of considerable dimensions on July 23d, and another on August 11th, 1906; shortly before these fires he had been up and down the railway on the train two or three times, but don't know just exactly the date, thinks it was some time in June, last time he was down; had not been along after that date until after the fire.

[Testimony of Fred W. Stahlman, for Plaintiff.]

Whereupon defendant waived cross-examination of said witness, and the plaintiff, to further support the issues in its behalf, called FRED W. STAHLMAN, who being first duly sworn testified as follows:

Direct Examination.

He lives at Detroit, and had so lived there about seventeen years; was at present Assistant Forest Ranger; in 1906 was postmaster part of the time, attending to that part of the time, working at logging camps and sawmills; knows the general location of the track and right of way of the Corvallis and Eastern Railroad Company, and had occasion to go up

(Testimony of Fred W. Stahlman.)

and down the track or right of way in June, 1906, as far west as the boundary of the Forest Reserve; up once during the Spring, don't know the date exactly, but during the fore part of July; walked west about seven or eight miles from Detroit; perhaps half a mile or a mile west of the water-tank, and on that occasion observed the condition of the right of way and track of the company as to accumulation of combustible or inflammable material; this was some time between the 1st and 20th of July, it was after the 4th, could not say definitely, but some time between the 4th and 20th, perhaps the tenth or twelfth, in there.

Whereupon counsel for defendant objected to, or any testimony thereafter as to the condition of said right of way or track as to combustible or inflammable material thereon, as too remote; which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and said witness further testified as follows:

Q. Now, what was the condition, and what was there upon the right of way of a combustible or inflammable nature?

A. Well, I don't know how to define that right of way. What distance it would be from the rails.

Q. Well, you state what was there and how near it was to the rails. I will define that later.

A. Well, I noticed dead fern, brush and grass.

Q. Were there any logs there? A. Yes, sir.

Q. What sort of logs were they?

A. They were rotten logs, decayed and green logs.

Q. How near did that stuff lie to the track?

(Testimony of Fred W. Stahlman.)

A. There were fern and grass directly up to the end of the ties. Brush some farther back.

Q. How much farther?

A. Perhaps ten or twelve feet—twenty feet.

Q. That brush and fern—what was its condition?

A. During July it would be dry.

Q. Do you recall whether it was standing or had been cut? A. The fern—grass?

Q. Yes.

A. I don't think it had been cut. I think the fern from the previous year had died and fallen down and the grass was near seeding time—some of it was dry, some was green. Perhaps some was cut—I am not certain.

Whereupon said witness upon cross-examination testified as follows:

That he went fishing on that day, down the track that seven or eight miles, went along river in some places, and some places along the track, but not positive as to any particular place; coming back went the entire distance on the track; it was on Sunday; noticed that the accumulation there was very dry, and thought it was dangerous, it might take fire; smoked at that time, did not set it afire smoking; no one was with him; left some time in the morning, did not have much of a load; went into the Forestry Service two years ago, and thinks to the best of his recollection that was the only time that he was up and down the railroad track in 1906, but had been down the year before; had been up and down there every year, fishing; a good many people go up and

(Testimony of Fred W. Stahlman.)

down there fishing; that is a timbered country and the mountain sides are covered with more or less timber; fern grows up in the spring; arrived back late in the evening, perhaps from three to five o'clock; went a good portion of the way on the river, walking along the bank of the river, or in the water fishing, going down; it was quite late in the afternoon before he started home, started home perhaps one o'clock, between one and two, possibly two, and got home some time before five o'clock; paid no attention to time; did not fish any coming home, just walked, a good swinging walk; fern grows up in the Spring, and during part of the season from July to November, dies during the dry period; do not get frost up there in July; in some instances fern dies where the ground is very dry, for instance where grown on rock, and not enough moisture to keep green; don't know whether there was fine pasture land about McRae's cabin; never took up the roots of the fern to see whether it stands right on top of the ground or not, doesn't know whether it goes down to the water or not; last year's fern does not die before spring, does not decay before spring; remains there six months or a year without decaying, and new fern comes up above it, and if heavy enough the green fern shades the ground; in some instances heavy, and some not, but most instances it is not heavy; in some places where there is heavy fir brush there is fern grows, some places grown in the fir; brush would have to be pretty thick if it killed the fern out; did not refer to any particular place where

(Testimony of Fred W. Stahlman.)

the brush was thick along there, but different places; in some places brush was growing thick, others not, but cannot tell any particular place; saw the brush where it was thick in some places along the track.

Whereupon upon redirect examination said witness further testified as follows:

That at that time of the year he is not positive as to places where fern had died from the year before and was in a dry condition, and whether the green fern was thick at those places; don't remember if he was smoking as he went along the track that day, but traveled on foot as he went back; saw the engines of defendant company throwing sparks or cinders during that summer, shortly before and after the fire of July 23d, and the fire of August 11th, 1906, at Detroit, nearly three miles east of Berry.

Whereupon counsel for plaintiff asked said witness the following question:

Q. Now, what sort of cinders and sparks were those that you saw the engine throwing?

To which counsel for defendant objected, that same was incompetent, irrelevant and immaterial, and particularly upon the ground that the witness does not identify this engine or the engine that was there, the same locality or the same condition, or what the engine was doing, or anything of that kind; which objections were and each thereof was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

(Testimony of Fred W. Stahlman.)

A. Those cinders were small, perhaps $\frac{1}{8}$ or $\frac{1}{4}$ inch in size and were still burning.

Q. Still burning? A. Yes, sir.

Q. How do you know?

A. I noticed a particular instance above Detroit, there was one place particular, sawdust accumulated both sides of the track, I stopped there on my way home from the mill to dinner, and a train passed me and noticed sparks drop. I stopped and watched them a few moments and seen them take fire, the sawdust. I put the fire out.

Whereupon counsel for defendant moved to strike out the last answer of said witness, upon the ground that the same was incompetent, irrelevant, which motion was denied, to which ruling the defendant then and there excepted, which exception was allowed.

Whereupon said witness further testified:

That the train was going east at that time, and it was an ordinary and regular train of the company, going anywhere from eleven to two o'clock; about that same time observed the same train or locomotive throwing sparks, in this instance where mentioned, and at another time during that summer, in front of his house where he was living at Detroit; he noticed a train coming in there in the evening, and noticed sparks still burning;

Whereupon said witness was asked the following questions by counsel for plaintiff:

Q. Still burning. What observation did you make?

(Testimony of Fred W. Stahlman.)

A. I was standing one evening close to the track when the train came in and the sparks, I felt them dropping on my hat. Taken my hat off to see where it was singed, where the live sparks had dropped.

Q. How long before this fire at McRae's cabin there, or afterwards, were those occasions?

A. It was after, some time during that summer. I am not positive as to the time.

Q. Afterwards? A. After the fire.

Q. What is your best impression as to how long after? A. Perhaps a month.

Whereupon counsel for defendant moved to strike out all of the foregoing testimony of said witness specifically set out by questions and answers, as incompetent and irrelevant, which motion was denied, to which ruling the defendant then and there excepted, which exception was allowed.

Whereupon said witness upon recross-examination further testified as follows:

That Hoover's mill is in the neighborhood of 7 miles east of what is known as McRae's place, and Detroit is about two and a half miles from Hoover's mill; those places he spoke of that he saw the sparks was in the year 1906; may have seen them, but not positive that he has ever seen them at any other time except that year.

[Testimony of Charles C. Giebler, for Plaintiff.]

Whereupon the plaintiff called CHARLES C. GIEBLER, who being first duly sworn testified as follows:

That he lives at Detroit, and has so lived there since 1898; lumberman; falling timber for S. V. Hall; in June, July, and up until the first of August was working in tan bark, and during those months had considerable occasion to go up and down the right of way and track of defendant every week or so, and recollects the fires that occurred July 23d and August 11th; had been along the right of way the Sunday before the fire in each case, and observed the condition of track and right of way as to combustible material thereon.

Whereupon counsel for plaintiff asked said witness the following question: Q. What did you see on the right of way there along the track? (Confining it from the water-tank to the fire along McRae's place, along there.)

To which counsel for defendant objected as incompetent, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed.

Whereupon said witness answered: A. Along there is logs that had been cut and rolled down from where the right of way was first made, alongside the slope of the right of way. Ferns been cut, and brush, you know, and left lay, and then vines would grow over it.

Q. At this time—Sunday before the fire—what

(Testimony of Charles C. Giebler.)

was the condition of that stuff?

A. Why, it was dry at that time of the year—generally pretty dry up in there.

Whereupon said witness further testified that that right of way was cut along there about 22 or 23 years ago, and that this stuff in places came right close to the end of the ties, in others farther away; there was fern and grass along there, fern grows up as high as the track, then they cut it down, and just let it lie; it was dry that way every year, sears and dries up; the section crew of the Corvallis & Eastern cuts it there he supposes.

Whereupon said witness upon cross-examination further testified as follows:

He went into the canyon in March, 1898, and was not up there when the railroad was built through; he knows the condition that existed at the time the railroad was built, because the right of way shows the logs and everything today; he is falling timber for S. V. Hall at Granite Mountain Siding, below the McRae place about one mile; there are about seventeen men working there; did not work there in 1906, but worked close to Detroit; the occasion of his going up and down the right of way in 1906 was that he had some friends lived there at Granite Mountain Siding—the Whitmans; he was going back and forwards to visit his friends; thinks that the right of way in places is just the same now as it had been at the time the line was built, and the grass grew right up to the track; the fern grows inside of the rails, and is then cut down, have seen Mr. Bresler, the sec-

(Testimony of Charles C. Giebler.)

tion foreman, and his crew, cutting it down; saw them this last summer, they were cutting this side of Breitenbush bridge; never saw them cut it before 1906 that he remembers, but have seen fern along there; did not see them cutting it in 1906 that he remembers of; fern usually commences to turn in July, some of it is seared, and take where it is damp, it is green; it comes up along the railroad track there about May, some of it lives until September; it is green until September in some places, then in other places it is dead by the first of August, in a dying condition; in other places no water makes it die so early in the year, but generally it stays green until the frost comes; they get frost there as early as September, but rarely as early as the first of August; does not know how deep the fern roots go down, nor anything about its habits; no one called his attention to the fact that the fern died so early in the year, he saw it with his own eyes, saw it different places where it had died out as early as July, just small patches, places where it is rocky, and then it would be green around, green in other places except where it is cut with a scythe and lopped over; it stays green except on small rocky points until way along in October, except where cut with a scythe; grass will sear quicker than the fern; grass in some places grows under the fern; grass is seldom green the whole year round, but where there is enough fern to shade it, of course it would stay green as a natural consequence; there is considerable fern right next to the right of way, and that was green as a general prop-

(Testimony of Charles C. Giebler.)

osition, unless it was cut down; they don't always burn it up, but let it lay for awhile; saw it left laying in 1906, along between Berry and Granite Mountain, and above Berry, most all the way between Berry and Granite Mountain, cannot say how long it was let lay, sometimes all summer, in 1906 until the fire caught; there was dead grass and fern along there in August, 1906, cut down; some of it was still standing; the grass that was cut down there in August, the Sunday before these fires, was dry, but don't know how long it had been cut; cut it all the way from Granite Mountain wherever it is not rocky, or along where the flats are; it was not cut at the water-tank, no fern grows there, right immediately at the water-tank; 200 yards above it there is fern there on a little flat and around the hill; he saw it somewhere about the Sunday before the fire, the first fire, July 23d; supposed it was there during the fire, but he was not down at that time; never saw it after the fire; does not know how long it had been cut before the fire; the fire passed over that section of the country where he saw it; at that flat just above the Granite Mountain there, that is all burned off now, and from McRae's camp; he is speaking about the fire of July 23d; it ran off very nearly to McRae's camp, on the right of the railroad; it did not burn towards the river, nor on the right-hand side as you go east, to amount to anything, just reached across the road; it burned on the left; burned the cabins and everything in there; he was not in that part of the country on July 23d, and could not say whether

(Testimony of Charles C. Giebler.)

it was on July 23d or not, for he never went down until after the fire was over; he went down the 17th of August, and don't know anything about the July 23d fire in particular; was down that way the Sunday before the July 23d fire, but was not down there after until the 17th of August, which was after both fires; don't remember whether the fire occurred on Monday.

[Testimony of Carl Knudson, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called CARL KNUDSON, who being first duly sworn, testified as follows:

Direct Examination.

He works in the woods; was living in Detroit in 1906, and in July and August, and during the summer of that year; knew the general location of the right of way and track of defendant, and every two or three weeks during that summer was accustomed to go up and down that track from Berry to the water-tank; saw the fires of August 11th and July 23d; about two weeks prior to the fire of July 23d had been down the track as far as the water-tank, and was all along the track down as far as the McRae place; went on a wheel—speeder—on the railroad track, always used a wheel; he was working in the woods; did not have occasion on those trips to notice the condition near the railroad track as to material along there that was combustible, but did notice there was trash and stuff along the right of way, trash, grass and dry logs—fern, it was dry—this con-

(Testimony of Carl Knudson.)

dition was all along up, and some places up to the track, and other places not so close, about eight or ten feet; dry grass, he supposed, would come right up to the track, all along; this trash consisted of twigs and limbs; about 8 feet, eight or ten feet, away from the track.

Whereupon upon cross-examination said witness further testified that he was working up there for Hoover in 1906, their logging camp is about two miles east of Detroit, right at the mill; went down railroad every week or so on a wheel speeder, not very swift; it was a velocipede, propelled by man power; worked with his hands—pump-like—one man did it; at the time he was riding on his velocipede, no one with him; his object in going down the road was his folks lived down there; other persons went up and down the road on velocipedes, he guessed, but he does not travel that way now; has no feeling against the company that he knows of, has not talked against the company, did not get mad because the company stopped people from riding on wheels; traveled about eight miles an hour on his wheel, and it took all his strength to pull eight miles an hour on wheel; was not pumping pretty hard, watching his wheel, going up and down there; last time he went down there, before the fire, was about two weeks before the fire of July 23d, he went down on Sunday.

Whereupon on redirect examination said witness further testified:

That his folks lived at Niagara, about ten miles west from Berry, along the railroad track; as he

(Testimony of Christopher Knudson.)

was riding on his wheel his head was free to turn and observe the condition on either side of the track.

[Testimony of Christopher Knudson, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called CHRISTOPHER KNUDSON, who being first duly sworn testified as follows:

He lives at Niagara, and has lived up there about twenty years, and was living there in 1906; working in a lumber camp in Detroit; during the summer of 1906, especially in the months of June, July and August, had occasion to pass up and down the track of defendant, about once a month; remembers the fires of July 23d and August 11th, 1906; passed along the right of way there about three weeks before the fire of July 23d, on the train of defendant, coming up, about a week after the fire, passed along there, and passed the McRae place at that time, went up and down on the train about a week before the fire, and about a week after the fire of July 23d; observed the condition of the right of way from along by McRae's place there, in that vicinity, about a week after the fire of July 23d; there was quite a lot of rubbish lying along the track, limbs, dry chips, grass and fern, all along the track; the track was all covered some places, some places you could hardly see the rails; it would be dry, or was dry, and out from the track there were logs, limbs, brush, fern; mostly dead stuff—dry; brush and logs were about thirty feet from track; brush was about thirty feet from track, some of logs jammed right up against the track at that time; these logs were not very sound, they were

(Testimony of Christopher Knudson.)

logs he supposed had laid there ever since the right of way was put through, just rolled over to the side and left lay there; dry on top; don't remember whether the season was wet or dry.

Whereupon upon cross-examination said witness testified:

That some of these logs were right up against the track, some laid along there by Spaulding's, right within two feet of the ties; rollway had been built there, rollway that Spaulding's had built to bring logs down; there was no skid road there, just a rollway made for the purpose of rolling logs down to put a load on the track or on the train; built by the Spaulding Company when they logged that off a few years ago; it had been used about three years before the fire, and built about four years before; these are the logs that he said are up there against the right of way, about a quarter of a mile above where the McRae house was burned down; there was grass on the track, brush on track some of the time, brush scattered all along the track all through there, lying right over the rails, and when the trains would run over it, the wheels would run right over the brush in places.

Whereupon upon redirect examination said witness further testified:

That his folks resided at Niagara, and he is a brother of the other Knudson who was on the witness-stand; the log road is not the only place where there were logs within two feet of the ties, logs scattered all through there, all along that country,

(Testimony of Christopher Knudson.)

about every quarter of a mile, and these were the logs that he spoke of as being dead, they had been there for years; every windstorm there would be limbs blow off and lay on the track and lay right across the rail, some of them would be run over, and some of them, the fellows would come along and throw them off, parties going along, traveling up and down the track; the section-men would come and they would not throw them very far away from the railroad track, about six or eight feet.

Whereupon upon recross-examination said witness further testified as follows:

He had seen them carry some away, but don't remember when it was, it happens pretty near every year; these limbs come from the trees, the trees are back from the railroad twenty or thirty feet; sometimes there was a windstorm in July, but don't remember whether there was one in July, 1906, or not, or in August, before August 11th, or not, or in June, 1906, don't remember whether there were heavy rains there in June, 1906, or what kind of weather there was up there in June or July, 1906.

[Testimony of Frank Ellsworth, for Plaintiff.]

Whereupon plaintiff, to further support the issues in its behalf, called FRANK ELLSWORTH, who being first duly sworn testified on direct examination as follows:

He is 31 years old; resides in Albany; in 1906 was a bridge carpenter on the Corvallis and Eastern Railroad, ran from Corvallis up to Detroit; Dick McCulley was foreman; remembers about the fire

(Testimony of Frank Ellsworth.)

of July 23, 1906, but was not up there when it was burning; went home on account of his family being sick; was not up there at all, was away from the railroad track when he went up; he went down Saturday, and Saturday was the time of the big fire; he did not come up to Detroit until Monday; he was working at Mill City when they went up there; had been over the right of way during the summer, prior to the fire, very often, sometimes going up on the train, most of the time put a handcar on the train and go up, and then pump back, it is down grade; had gone over the right of way pretty often prior to the fire of July 23d, but don't know exactly how often; would go pretty often to work—then go back to Albany, and come up to Detroit again; can't tell exactly how often; was up there nearly every month; they had been working on the bridge there at Mill City about a month; at the time the fire occurred was at Mill City working; the rest of the boys went up, he got on the train to go home because his folks were sick; he came on to Albany, did not go back until next Monday morning; Mill City is about eighteen miles west from Detroit; he had been up to Detroit that summer, most of the time went up on train, put handcar on flat car and went up, then came back—dropped back—with the push car, it is downgrade; that is the way they came back most of the time, hardly ever came back on train.

Whereupon counsel for plaintiff asked the witness the following question:

(Testimony of Frank Ellsworth.)

Q. Now, on these trips that you went up there, did you have occasion, or did you observe, the engines and locomotives—or the locomotive of the Corvallis & Eastern Railroad, as to whether or not it threw fire?

A. Well, say, I don't know whether it ever throwed any fire; can't remember as to it ever throwing fire; I never seen them throw fire. I tell you what I saw one time. I was in Albany there when they picked up a load of hardwood at Santiam, and came in, the whole top afire; how it come on fire, I don't know, but it was on fire; I seen it myself.

Whereupon counsel for defendant moved to strike out the answer of the witness last above set out; whereupon the Court said:

COURT.—It is not material in this. You will have to confine it to this section of the road, unless you want to show that this engine is the one that did the damage in this case.

Whereupon said witness was further interrogated and testified as follows:

Q. Was that the engine that drew the regular train?

A. That is the engine that drew the regular train, yes, sir.

Q. That was hauling that car?

A. It was hauling that car of hardwood there for the chair factory there in Albany.

Q. How long before or after the 23d of July, or the 11th of August, was this?

(Testimony of Frank Ellsworth.)

A. It was after that; shortly after, I can't tell the date.

Q. What is your best impression?

A. I don't know.

Whereupon counsel for defendant moved to strike out all of the foregoing testimony last above set out, as incompetent and irrelevant; whereupon the Court said: "Wait until we get through with the witness."

Whereupon said witness was further interrogated, and testified as follows:

Q. Now, what is your best recollection as to how long after?

A. It was along shortly after that; two or three months after that; won't say sure; somewhere along there; I never kept no dates or anything about it; I don't know.

Q. Think as much as two or three months?

A. I think so.

Q. Now, then, when you went up there on these trains, during July and August, up to Detroit, and along that piece of road from the water-tank on up, and Mill City on up, what if any precautions did you take with the wearing apparel you had with you to keep it from catching fire?

Whereupon counsel for defendant objected to the same as immaterial.

Whereupon the following colloquy occurred:

COURT.—He went up on these trains running regularly?

Mr. McCOURT.—Yes, the regular trains.

COURT.—During this time?

(Testimony of Frank Ellsworth.)

Mr. McCOURT.—Yes, sir.

Mr. FENTON.—Do I understand you to claim this witness went back and forth on the train during July and August, close to the time of these fires, and has so testified?

Mr. McCOURT.—I don't know whether he so testified or not.

Whereupon said witness was further interrogated and testified as follows:

Q. How often would you move—the gang of you—from one place to another on these trains?

A. It would come different ways, sometimes we would go once or twice a month, and other times not; it depends on the work.

Q. Would go clear up once or twice a month—how often would you move?

A. Sometimes on a big job—sometimes a month on bridge—other times a week; sometimes two weeks on a bridge, other times three weeks.

Q. What would you do when you got through working on a bridge?

A. Go to another, or go to a cattle-guard or something.

Q. On the regular train?

A. On the regular train that we traveled on and went up to Detroit.

Q. Did these trips occur during the months of July and August?

A. Yes, we all went up there. Hold on! In July and August we was working on the Albany bridge; did not go so very often then; was putting

(Testimony of Frank Ellsworth.)

trestle in the Albany bridge; went once a month, probably; sometimes oftener, sometimes we didn't.

Whereupon the following colloquy between counsel occurred in the presence of the Court and jury:

Mr. McCOURT.—I submit, if the Court please, that it is sufficiently definite to go to the jury. The witness never kept any track of it; it was in and about this same time.

Mr. FENTON.—I understood this witness to say—I don't know whether I am right—that he was working at Mill City, 18 miles west of Detroit, at the time of the fire, and that they had been working there a month, and that he, when the fire happened, went home to Albany where his folks were sick. If that is the case he must have been out of touch; he has not testified he went to Detroit during that time.

Whereupon the witness further answered: I went to Detroit the next Monday morning. I went home and stayed over Sunday; Monday went through. The boys was at Detroit; we went back then, because the fire was away from the railroad track, and we thought the danger was over, and went back.

Q. Now, how long before that had you been up there? A. I can't tell you at all.

Q. Was it within two weeks or a month?

A. I think longer than two weeks, because we was working on the Mill City bridge, and I think that was two or three weeks.

Q. Where did you go from the Mill City bridge, or where had you been before you started to work

(Testimony of Frank Ellsworth.)

on the Mill City bridge?

A. I think we come from Albany; think we had been at Albany to work.

Q. Between the time of the fire and the time you went to work on the Mill City bridge, had you been to Detroit? A. Before the fire?

Q. Yes.

A. Yes, we had been to Detroit before the fire, yes, sir.

Mr. FENTON.—He don't say whether several months or two months before.

A. Well, I can't tell you, because I don't know, and I won't tell what I don't know.

Q. Between the time you first went to work on the Mill City bridge, and the fire, had you been to Detroit? A. You mean before the fire?

Q. Yes.

A. Yes, we had been there, but I don't know when.

Q. You had gone to work on the Mill City bridge about two weeks before?

A. Yes, about two weeks before; we was fixing a pier, at the end of the Mill City bridge.

Q. Now, on these trips, where did you ride?

A. I will tell you; sometimes I rode in the engine, and sometimes I rode all over—in the coach behind, and changed around; did not exactly always ride in one place.

Q. Did you see the train that came up that day that the fire was set at the water-tank?

A. Yes, sir; I was working at Mill City then—

(Testimony of Frank Ellsworth.)

that day; I saw the train, yes, sir.

Q. Do you recall what sort of a train it was as to being long or short?

A. No, sir, I couldn't tell you; I don't know anything about that; I couldn't tell you, because I don't know.

Q. As to the train that went up the day of the fire by Berry—there at McRae's place—did you observe that train?

A. No, sir; I don't know; I can't tell you because I don't remember.

Q. I will ask you whether or not you rode on the outside—on the flat car, when you had hand-car?

A. No, I don't—I don't know where I rode; I can't tell you.

Q. Do you ever ride outside?

A. Sometimes.

Q. Now, on these occasions, did you observe whether or not the engines threw sparks that lit alive?

Whereupon counsel for defendant objected to the same as incompetent, irrelevant, and too remote; whereupon the Court said:

COURT.—It is difficult to tell what the witness does intend to testify, but I understand that only a month before the fire he rode up, and if so, it is competent, and the jury will be the judges.

To which ruling the defendant then and there excepted, which exception was allowed; whereupon said witness was further interrogated and testified as follows:

(Testimony of Frank Ellsworth.)

Q. Just tell the jury what you know about these engines throwing sparks, without my drawing—

To which counsel for defendant objected as incompetent, and being too remote; which objections and each thereof were overruled by the Court, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

A. Well, sir, they throwed quite a few sparks; we always had our oil coats—I generally put mine under the flat car to be safe; I never had it on fire. but I wanted to be safe.

Whereupon the witness further testified that he rode on the engine going up there, some of the times, sometimes didn't do anything, sometimes helped them pitch a little wood.

Whereupon said witness was further interrogated and testified as follows:

Q. Did you do that during these months of June, July and August that year, 1906, do you remember?

A. We would come up there often; I was working there. Could not tell exactly how often I was there—don't remember, we went up often, just how the work got ahead. They would say when we was to go up there; sometimes we would go often, sometimes two or three times a month—other times work quite a bit, and then go back.

Q. So you could not say whether those were times—whether you ever fired any during those months I mentioned?

A. No, I couldn't swear.

(Testimony of Frank Ellsworth.)

Q. At the time you was working there on that Mill City bridge, the train passed there how often?

A. Well, it come up in the morning, and come back at night. Sometimes have work train up, once in a while.

Q. Did you observe the trains as they passed, going up, as to whether or not they threw sparks or cinders?

A. Have seen them coming up there when they had all they could pull, most of the time.

Q. Did they throw sparks and cinders that would set things afire on the ground, when they lit?

(Objected to as leading.)

Q. What kind of sparks and cinders were those?

A. They would be lots of sparks; I would have my dinner bucket on one of them flats, and it would be black with it.

Whereupon upon cross-examination said witness further testified:

That he worked for the Corvallis & Eastern about three years ago; had not been at work for them since.

[Testimony of Emory Cooper, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called EMORY COOPER, who being first duly sworn testified as follows:

He lives at Rickreall, is working in a grist-mill at present; used to be deputy sheriff of Marion County; was working for the defendant in June, July and August, 1906, in bridge department, and was up and around the water-tank, up near Berry

(Testimony of Emory Cooper.)

at the time the fires occurred up there, at Albany at the time of the last fire, but were located at Mill City working on the Mill City bridge; does not think they had been up and down the right of way from the western boundary of the Forest Reserve, or the water-tank, on up east very many times during those months, to the best of his knowledge; could not say how long prior to July 23d he had been as far as the water-tank or past the water-tank, might have been two weeks, might have been a month; it was a short time, but would not attempt to say; don't think he was above the water-tank after the fire of July 23d, and before the fire of August 11th; between the two fires they were working on a job taking engines out of a ditch, and went as far as the water-tank at that time, don't think he went above; going to work they generally hauled them on the train, on the regular train that plied up and down the track between Albany and Detroit; would ride in different places, privileged to ride in any part of the train they chose; had ridden on the outside, on flat cars, when it was not stormy; could not say that he made a trip up and down the track between water-tank and east to Berry within a month; he was not working at that time; went to work for the company July 16th; had been to Detroit before the fire occurred, but only made one trip; on that trip noticed that the condition of the right of way along the track was rather dry, dead vegetation, brush, moss, partly dry at that time; would judge it was different distances from the

(Testimony of Emory Cooper.)

track all the way through; at places probably four to six feet, other places probably twenty to thirty feet away; it is rather mountainous there in places, rocky cliffs, in those places this condition did not occur, but as a general thing it was pretty rough; did not observe the locomotive in particular on this trip, or other trips, as to whether or not it threw sparks and cinders; would occasionally see sparks, but could not swear how large they were because he never paid enough attention, never examined them at all; they would sometimes be there when they would light; some of them went down the back of his neck, and he thought that they were very lively; they did not go very far; did not see any of the sparks set fire, but felt them.

[Testimony of Sa. Huddleston, for Plaintiff.]

Whereupon cross-examination of said witness was waived, and plaintiff, to further support the issues in its behalf, called SA. HUDDLESTON, who being first duly sworn, testified as follows:

Direct Examination.

He lives at St. Johns, and is a millwright there at the mill, doing general carpenter work; was working in the bridge department of defendant in the summer of 1906; remembers the fire of July 23d, remembers two fires they had up there, but don't remember exactly what date it was; had been at work for the company probably about five years; worked for the company ten years altogether; ceased working for the company April 17th last; had

(Testimony of Sa. Huddleston.)

occasion to ride up and down the track of defendant during the summer of 1906, especially during the months of July and August; they went over different bridges all the way up along the line; generally rode up on the train and came back on the hand-car; worked in probably from Detroit or Berry, or wherever they started out to work; most of the time went on regular train, once in a great while had an extra, and would come on that, but not very often; in the summer time generally rode out on the flats, in warm weather; could not say how long before the first or second fire he rode from the water-tank through on to Detroit, but rode up there so many times he never kept track; it was probably two or three weeks, but could not say whether he did so or not between the two fires; did not go with Emory Cooper on the first trip after he was employed, but made several trips up in there with him, before the fire, pretty certain it was before the fire, and since, he thinks; could not say how often they made the trip on these trains during that summer; sometimes they might be out at a time a month before they would go up there, and it might be three weeks, sometimes they would go up there within two weeks, make two trips, something like that; could not say that they made such trips in July and August of that year, but thinks he was up there two, three or four times during that time; could not say just how many times they were there during July and August, as he kept no track of it; during those trips he saw that the engines threw sparks;

(Testimony of Sa. Huddleston.)

these sparks would sometimes burn a man, and sometimes they would not; he had been burned with them; he observed the condition of the right of way as to accumulation of grass or dead stuff that would catch fire; has seen about all the right of way there is up there, from one end of the road to the other, from Albany up, anyway; the condition of the road from the water-tank to Berry—there was grass, fern and brush, logs, everything lying scattered along there, and it was dry at that time of the year, that is, the dead fern; the crop of the year before, lots of times lay on the ground, all perfectly dry, lots lying on the ground at that time, in different places; was not that way all along the line, but it was in different places; between the water-tank and Berry, part of the way, there was dead fern, grass, brush and logs; there were logs and brush all the way; grass and ferns mostly where it came on the flat, and where it was grade; there wasn't much grass and fern where it come off on the level—on the flat—where those flats were; the cabin at McRae's place stood right at the lower end of a kind of a flat, kind of a bench; the track came out on that, that was considered level, pretty flat; some of the logs were pretty close to the track, so close that they had to chop out the end of the logs to let the hubs of the trucks by, to keep the trucks from hitting the logs in places; the bridge gang cut out lots of logs, and there were lots cut, he supposed the section gang cut them out, or the walking boss, or whatever he was, the man that walked, the track-

(Testimony of Sa. Huddleston.)

walker; the brush that came off these logs was all the way along the road, at some places it laid up against the end of the ties, some places farther off, just so it got out of the way of the train, so it would not hit the train, was about all they done, he guessed—necessary; existed that way ever since he was on the road, the first time he was on the road it was that way; the track from the water-tank up to Berry was upgrade, he would say it was a pretty heavy grade, not as heavy as he has seen, of course, but quite a heavy grade.

Whereupon upon cross-examination said witness testified as follows:

He quite working for the company April 17th last; does not know just when he talked to Mr. McCourt, or the Government people, about what he knew about this matter, but thinks he told Mr. McCourt after he moved down to St. Johns, but did not hunt them up to tell them, he had word sent to him to come over; it came through the telephone, Mr. T. L. Rice, book-keeper of the St. Johns Lumber Company, informed him that man wanted to see him, but he had not told the bookkeeper what he knew about this; was working up there in June and July, 1906, but don't know exactly where it was, where they were at work in July, any more than they were working during the time in one place and part of the time in another; don't think they worked a month or six weeks at one time at Mill City, on the big bridge, in June or July; think they were working in Albany at the time of the first fire, on the bridge across the Willamette, worked

(Testimony of Sa. Huddleston.)

there quite a while; was up to Detroit during that summer; they had to go up there on and off all the time, sometimes they were called up to run over work done, like over track and bridges; part of the time they ride on the flat cars, and sparks would come out and burn him; they could go in either coach, passenger-coach, and sit down; tools lay on the flat car, they had to watch them a good many times, they lost several tools off flats—jar right off; sometimes the flat car was right next to the engine, sometimes farther back; don't know whether it was the first or second flat from the engine, when he got burned; stayed out there all the time on some occasions, some occasions went back into the baggage-room—rode up and somebody else stayed out; could have gone into the baggage-room or the passenger-coach, or into any of the coaches on the car, or the train; they carried quite a number of tools, lots of times put these on the flat, sometimes in the baggage-car, when they did not have very many tools; they put hand-car out on flat car; they had to stay out there, some of them, to watch the tools; no one would hook them, but they would fall off, jar off the flat car; did not all stay out there for that purpose, some of them went back in through, others stayed as well as he and Mr. Cooper; found logs that he had to cut, along about Sardine Mountain, below the water-tank, clear all the way to Berry, and some places between Berry and Detroit; would not have to recut these; these logs came downhill, slid down, some of them slid down the mountain; some of them came from up

(Testimony of Sa. Huddleston.)

there, and some of them stood along the track, and would fall down; if a tree fell on the track or close to the track, so a coach could not move, they would have to cut it, and if they slid from the mountains they had to be taken away; this was in summer, and sometimes in winter; during that fire there were some came down or burned down, and these were some of the trees about which he was testifying; some of them were there before, somebody else had cut them off, but don't know who it was, unless the track-walker or the section-gang; they were pitched down the bank and were laid down right close, right at the end of the ties, close to the rail; had slid down from the mountain, it was steep back to the mountains, and the trees stood up the mountain, some old and some young; don't think the trees would slide down a quarter of a mile, but might possibly slide down several hundred feet; have seen some of them cut probably one hundred feet away from the track; big trees would fall over the track; if they fell across the track they would have to cut them out of the way; and when that occurred the railroad people would come and cut them out of the way for the train to get through, every time they found one that way; thinks he cut one down in the month of June, July, or August, 1906, but don't remember exact dates; they cut them out during that fire, that is, the fire hadn't gone out yet, it was burning, they had to go up and put some of them out, put the trees out that were on fire; some trees fell across the track, one across a little bridge and broke that down; they had to take

(Testimony of Sa. Huddleston.)

that out; that was during the fire, right close up to Granite Mountain; he had reference in his direct testimony to all trees that came down there that they had to take away from the track and clean out; there were logs laid along the track that had been used for loading logs on the car; he could not tell who owned the land at all; these logs that he had reference to were above the water-tank; he does not know who owned the place along there; knows where the bunk-house was—supposed to be a boarding-house—cook-house, and it was not very far from that; there were logs a little up the track from that, up the railroad track, east of that; does not know that he saw the grass grow luxuriously over the track, but saw grass and fern all the way along on this little flat; this bunk-house was burned down; he thought there was great deal of fern that grows there, and grass, lots of grass growing along the track, rather on the side of that; did not see any cattle there in 1906; but have seen grass there every summer that he had been up there, and had been there both years; don't remember seeing any cattle running in there; may have seen a cow or something that way, maybe two or three, something like that, but don't remember of seeing any in that place; there was dead grass there in June; he had seen green grass there and had seen dead grass there in the latter part of the summer, plenty of dry dead grass there in the latter part of the summer of 1906, part of it was dry, and part green; there was dry fern in the summer of 1906, and green fern there too; don't know exactly what time

(Testimony of Sa. Huddleston.)

in 1906 he saw dry fern there, but thinks he could go there and see it at any time in summer, and anywhere, probably most any time during the latter part of the summer, but don't know exactly what month; any time he would be there; there was dry fern there, he would think, in the first part of September, 1906, but don't know whether there was dry fern or not, but there was dry stuff there before that fire; did not pay much attention to what was there afterward, never noticed, took any particular pains; did not notice how high the grass was, did not measure it; there was a good deal of mesquite grass; don't know what proportion was dry, never paid much particular attention; dry grass was up on the ground, would say it commenced from that bunk-house, the McRae house there on the right-hand side of the flat next to the river, there was quite a little bunch of grass there, and fern on that flat; that was on the south side of the railroad track that he just now spoke about; there was considerable brush on the north side of the railroad track, if he remembers right, considerable brush and willow, some green brush, and some dead brush; part of the way there was young trees growing there, part of the way there was not; there might have been some little firs around that McRae house, but don't know that to be a fact; have been there and seen that house many a time; there might have been some fir trees but don't remember just what was there, there might have been brush and fir trees; there was brush grows there, but never paid any particular attention to it, or how high the

(Testimony of Sa. Huddleston.)

fern was; it may have been half a foot, or probably all the way from two inches to six inches, maybe eight inches or ten inches; in July it might have been two to six inches, but he don't know; the fern from the year before is dead, and lays down, sometimes it was all sticking up two or three inches, sometimes higher; don't know whether it was three or six inches, but did not see any fern that grew in 1906 there that was six feet high, nor in any place that high.

Whereupon upon redirect examination said witness further testified as follows:

There was with him on that flat car, all that bridge gang, besides Cooper and himself and Ellsworth; Chris Christianson, Bill Gildow; Charley Gray was foreman, lots of days he would be there, and lots of days he would not, but don't remember anybody else; part of the time they were on flat car, and part of the time in coach; observed these other men being burned on their clothing, set fire, and of talking about the fire, getting burned; believes Christianson got his coat burned, or was talking about his coat being burned; some of these logs had come down lately, others had laid there, it looked like, for a good while; these logs had been there ever since he started to work on the road; first time he ever went up the road the logs were there, some of them; don't think he cut many down, don't think he did much cutting until about five years ago; prior to that time it was the track-walker or section-men who cut the logs; did not notice any logs had been removed from the right of way up to July and August, 1906.

[Testimony of Harry G. Hayes, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called HARRY G. HAYES, who being first duly sworn testified as follows:

He is in the retail furniture and hardware business at Eugene, Oregon, and in the retail business in Sacramento about one year before he went to Eugene; was in the Forest Service in 1906, located at Detroit, Oregon; had charge of what is known as the South half of the North half of the Cascade Range, say 75 miles north and south, and the width of the Range; Detroit was about the central portion; in his capacity as an employee of the Government at that time, he had occasion to observe the condition of the right of way of defendant from the water-tank at the west boundary of the Forest Reserve, on east of Berry, and also other portions of it; he took photographs, passed up and down the right of way a number of times, both walking, and on the train, sometimes on horseback; took photographs on March 6, 1906; observed the condition of the right of way on or about July 23, 1906; could not say that there was any material change between March 6th and that date; on July 23d and prior to that the right of way near the track, was that all of the natural conditions afforded a great deal of brush, briars, fern, logs, timber, fir and such things, and the logging conditions afforded logs, rollways, you might call them; the railroad company afforded rotten ties; in fact there was almost all kinds of vegetation; there

(Testimony of Harry G. Hayes.)

were places this vegetation and this matter were very dry, shortly prior to the first and second fires; there were only a few places where there was any moisture at all during the dry periods; of course through the winter it was very wet, but between March 6th and prior to this fire—after March 6th, of course it got dryer and dryer until after the fall rains came, about the 13th of September the rains come; there was a great deal of brush, logs, rotten ties, chips, and there was some green second growth of fir and hemlock, some cedar, that grew close to the track; some stands, no doubt, at this time, and would touch the cars as the trains passed by; there is green timber now between Detroit and Hoover's Mill that will touch box cars; no doubt that still stands, stood when he left there.

Whereupon the Court sustained the motion of defendant to strike out all that part of the testimony of witness relating to a point east of Detroit.

Whereupon said witness further testified that some of this material consisted of some logs that slid down the mountain; the end of the logs is between the ties—some logs—trees have fallen across the right of way, have been cut in two and the ends of them, generally speaking, some of them possibly touch the ties, some of them are two feet from the ties and on further; brush, he would say, a distance of two feet too on up the mountain; some of the logs were sound and very fresh; sometimes they slide down; a tree would break down on the side of a mountain and slide down; these are very fresh, have seen

(Testimony of Harry G. Hayes.)

that; others have been there a long time, they have been built for rollways; some of these were rotten, some were sound; all of these logs that were down there had not been used for a roadway; he can remember one instance where it seemed that a car had broken down—a car with logs on; they had been rolled just barely out of the way of the train; there had been young growth like fir and hemlock, cut down, fell over, and on the roadway, close up all along, it was dead and dry; saw some, it looked like it had been cut down from three to five years, that he noticed particularly; it was mostly fir and hemlock brush; the rotten ties were in the track, some had been pulled out and throwed just outside the track; it is a hard matter to state how frequently these rotten ties occur in the track between the water-tank up to Berry, there are a great many, and he believes there is five per cent. in that track from Berry up to Detroit in a decaying condition, and hewed ties, put in originally, five per cent. of these ties between the water-tank and Berry were decayed; they were rotten enough that he could take his heel and mash in the tie; the weight of the train had mashed a great many ties; they were rotten, cracked and decayed ties, had seen them taken out in pieces, a good many of them, not whole; the ties, shortly before the fires of July 23d and August 11th, were dry, of course, unless they should happen to be wet in some places where there was a seep, and the lower ones might be damp at that time; there are little springs that feed in at a few places; had been along the track or right of

(Testimony of Harry G. Hayes.)

way when the regular train was passing up or down the track from Albany to Detroit, during the summer, but not positive whether July and August, 1906, don't think it was in July, cannot remember any certain date; knows the date of March 6th, reported the condition of the track as he found it March 6th.

Whereupon cross-examination of said witness was waived.

[Testimony of Charles B. Merrick, for Plaintiff.]

Whereupon plaintiff, to further support the issues in its behalf, called CHARLES B. MERRICK, who having been duly sworn, further testified as follows:

He is Register of the local land office at Portland, and has the records of the public lands within the Oregon Land District in his possession, and has in his possession a map or plat purporting to show the location of the right of way of defendant, with the affidavit referred to on this map or plat made by J. M. Stewart.

Whereupon counsel for plaintiff offered the original map thus identified by the witness, it being understood that the defendant is the successor in interest and exercising the rights of property over the right of way indicated.

Whereupon counsel for plaintiff offered said map and affidavit in evidence, with leave to substitute certified copies thereof, which certified copy of said map is marked "Government's Exhibit 2," and which certified copy of said affidavit and letter of transmittal is marked "Plaintiff's Exhibit 3," and is in words and figures as follows, to wit:

Plaintiff's Exhibit No. 3 [Copy].

Refer in reply 5116

to this initial: ———

F 2

5/24 Rec'd. 2:45 P. M. C. J. R.

W. C. E.

1891

34545

DEPARTMENT OF THE INTERIOR.

General Land Office.

Washington, D. C., May 18, 1891.

Register and Receiver

Oregon City, Oregon.

Gentlemen: You are advised that on April 29, 1891, the Hon. Acting Secretary of the Interior approved a map filed by the Willamette Valley and Coast R. R. Co. under the provisions of the right of way act of Mar. 3, 1875, showing the definite location of said company's road from a point about $\frac{3}{4}$ of a mile south and $\frac{1}{8}$ of a mile west of the N. E. corner of Town. 10 S., Range 4 E. Willamette Meridian, Oregon, in an unsurveyed section, to a point in the valley of the North Fork of the Santiam River, a distance of 20 miles.

I transmit herewith a copy of said map, upon receipt of which you will proceed under the usual instructions in such cases.

Very respectfully

W. M. STONE,
Acting Commissioner.

State of Oregon,
County of Benton,—ss.

J. M. Stewart, being duly sworn, says that he is the Principal Resident Engineer of the Willamette Valley and Coast Railroad Company, that the survey of the line of route of said road from a point about three-fourths of a mile south and one-eighth of a mile West of the Northeast corner of Township 10 South, Range 4 East, Willamette Meridian, in an unsurveyed section to a point in the valley of the North Fork of the Santiam River, being a distance of twenty miles, was made by him as such Engineer of the company and under its authority, commencing on the 15th day of August, 1889, and ending on the 5th day of September, 1889, and such survey is accurately represented on the accompanying map marked A. B.

J. M. STEWART,
Resident Engineer Willamette Valley and Coast
Railroad Company.

Subscribed and sworn to before me this 6th day of
February, A. D. 1891.

[Seal] J. R. BRYSON,
Notary Public for Oregon, residing at Corvallis,
Oregon.

I, William M. Hoag, do hereby certify that I am the First Vice-president of the Willamette Valley and Coast Railroad Company, that J. M. Stewart, who subscribed the foregoing affidavit is the principal Resident Engineer of the said Company. That the survey of line of route of the Company's road, as ac-

curately represented on the accompanying map, was made under authority of the Company, that the said line of route so surveyed and as represented on the said map, was adopted by the Company by resolution of its Board of Directors, on the sixth day of February, 1891, as the definite location of the road, from a point about three fourths of a mile south and one eighth of a mile West of the North East corner of Township 10 South, Range 4 East of Willamette Meridian, in an unsurveyed section to a point in the valley of North Fork of the Santiam River, being a distance of twenty miles, and the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the Company may obtain the benefits of the Act of Congress approved March 3d, 1875, entitled An Act Granting to Railroads the right of way through the public lands of the United States.

[Seal]

WM. M. HOAG,

First Vice-president Willamette Valley and Coast Railroad Company.

ZEPHIN JOB,

Secretary Willamette Valley & Coast Railroad Company.

Dated at Corvallis, Oregon, this 6th day of February, 1891.

[Testimony of W. R. Gribble, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called W. R. GRIBBLE, who being first duly sworn testified as follows:

He lives at Salem; in 1906 he resided at Hood River, but was working for the Forest Service in the

(Testimony of W. R. Gribble.)

Cascades, South; that is, the south end of the northern division; on July 23 he was on the Metolius River on the east side of the mountain, and on July 27th crossed the divide and came to the west side of the mountains, reaching Detroit Sunday, July 29th, and the place where the fire started, on July 30th; from that time on he was working up on the fire on Sardine Mountain, until August 6th, when he came back down the railroad track to go into Detroit, when the fire was out; the first time he had been over the track that season from Detroit to the water-tank was that one trip; he had been to Detroit and back on the other end of the track, but from Detroit below, that was the first trip, that summer; the first fire did not run along the right of way scarcely any, it run up from the track, up the mountains; on August 6th he came back to Detroit from the fire, and noticed the condition of the right of way from the water-tank to the eastern limit of the fire, on up to Berry, as to the accumulation of combustible material on it; paid particular attention from the water-tank, where he got on the train, until he reached Berry, for he stayed out on the rear platform, where he could watch the track in particular; the condition of the right of way was very poor, judging by other railroads; there was fern, some fern growing right up to the rails; grass and weeds, also some small brush and places in between the rails on the ties where the old rotten ties had decayed so that people in walking over had kind of brushed them off and some places in between the ties where small poverty grass was

(Testimony of W. R. Gribble.)

growing between the rails; noticed several logs had been cut out, they looked like they had fell across the track and had simply cut out a piece so that the ends were laying on each side of the track, a piece had been cut out and rolled out for the train to pass through; he supposed some of the brush had been burned that had been cut from the trees, although a great amount of brush that had been cut down at previous times was still along the right of way, simply slashed down and left there, it would come right up to the ties in places; a number of places where the brush had grown right up to the ties, and had simply been cut down and left laying in that condition; some of the brush was green and growing, some—where it would be damp or shady places—was damp, but there were others where the brush and accumulation of litter was perfectly dry and inflammable, it all depended on the location; take it on rocky points where there was no water and the old accumulation was dry and inflammable at that time—take it in damp places, it was damp; does not recall what the condition was in and about this McRae cabin; does not know exact location, there were cabins along there, but he does not know what cabin was meant by McRae's cabin; noticed that cabins had been burned along there, after the fire of August 11th; could not tell which was the McRae cabin, could not designate any particular cabin by that name; knows some houses along there that had been used for bunk-houses or cook-houses where people had been living; on August 6th he was there near the fire, where the

(Testimony of W. R. Gribble.)

fire was said to have started, at the water-tank; Mr. Bronson, Mr. Guthrie and a gentleman whose name he thinks is Jack Monroe, were with him at that time; not particularly acquainted with Monroe, he was simply working on the fire; he observed conditions back there at that time, particularly to see if they could in any way arrive at a conclusion as to how the fire started, what had occasioned it; they saw where a fire had burned on a tie between the rails, and where it had either run out from that tie out onto the grass, and from there caught on a log, or at least there was a fire, at any rate, had burned from the ties out to the log outside the rail; whether it had run down the log and run inside the rail on the tie, or whether it had started on the tie and run out, he would not say, but the conditions showed it had started on the tie and around it; saw where the fire had burned on the tie, from the tie inside the rail there was a streak of fire, a streak where the fire had burned out onto a log outside the rail; it would be kind of hard to describe the condition of that tie which he saw there, accurately, but somewhere about the center of the tie, that is, halfway between the two rails, it had been burning, and it was burned along the tie out under the rail onto the end of the tie, and it burned from the end to about halfway between the two rails; it was an old tie, could not say how long it had been there, but it was not a sound tie, it was a tie that was slightly decayed, or at least decayed to some extent, and had been worn from walking over it or passing over it in different ways; Mr. Bronson

(Testimony of W. R. Gribble.)

first called his attention to this fire on the tie; he did not after that have occasion to examine the territory that had been burned over, he was not engaged in that; as soon as he got back to Detroit he went north onto another fire, and was out of that vicinity until some time the latter part of August.

Whereupon said witness upon cross-examination further testified as follows:

He went down to the water-tank on July 30th, near where the fire had started, did not find at that time where the tie was burned; that was after he came down the mountains that he noticed where the fire had burned the tie, it was on August 6th, west of the water-tank, or down the river from the water-tank, he would say about seven or eight miles from Detroit; it was on August 6th that he noticed where the fire had been on the tie, and that was down below the water-tank where the first fire was supposed to have started; he did not notice any evidence there of any person having camped right in that neighborhood; this tie he would judge was west of the water-tank, inside of a mile, possibly a half mile, possibly a mile; did not know a man named Whitman who lived there; did not learn of his living there, had heard the name, but did not know the man, and does not know where he lived; he went right back to Detroit on the train, came down on the push-car, and went back on the train when it got up, and rode on the rear end of the train going up from the water-tank to Berry; that was the time he saw the track; the car was not running very rapidly for a railroad train, he sup-

(Testimony of W. R. Gribble.)

posed it was going ten to fifteen miles an hour; could not designate the particular point where he saw the brush that had been cut down and left lying, it would be somewhere between the water-tank and Berry; he could not say whether it was nearer Berry than the water-tank, or otherwise, but would think that it would be nearer the water-tank, near where the fire occurred; it was east of where the fire had been, for he was not below the fire, it was not burned at all; the fire there went up the hill before it went east, or went north, he would judge something like a northern direction to climb the hill; the place where he found the brush, there had been old brush cut, he should judge, nearly all the way from the water-tank up to near Berry, there had some time been brush, and it had been cut down, and in places was just lying along; he would not say, could not say, how many places; it extended in places at least a quarter of a mile—old brush cut down and left; that was between the water-tank and Berry; does not know what the distance is from Berry to the water-tank, does not think more than four miles; does not know any mountain called Granite Mountain; he would say that where the brush was cut down would be above the tank, probably half a mile or more, would not say how far it was, he does not remember; it had not been burned at all; when he left the railroad track and got up the hill, there was some brush, but mostly timber; there was no brush where it left the railroad track, or any burn through the brush at all, it had not burned any brush down, none right there, it was

(Testimony of W. R. Gribble.)

on a rocky point, rather rocky; there was grass—poverty grass—on the rocky point, yellow and dry when he saw it; the dry grass that was burned was just along the railroad track where the grade had been cut out; the grass right along the track where the fire run out from the tie was burned, just as it came out from under the tie it had burned the grass, but only just that little strip where it struck the log and run up the hill, he supposed it ran up the hill; the burn was inside of ten feet wide, it had burned something like ten feet wide, it had not burned over ten feet where it left the ties, that is, ten feet up and down the track, east and west; he would say the track there ran somewhere near east and west, it was following the canyon; he did not notice that it had burned the right hand side of the railroad track, as he went east; did not see that any fire had been on the right side of the track, that is, the south side, did not see where any fire had burned; the tie had not burned clear over to the south end of the tie, it had not burned the south end of the tie at all; the tie was about the same condition all the way through, it was not a sound tie, it was not a new tie; about halfway of the tie had burned; there was coal there that had been caused, he supposed, from the fire burning; they were all dead coals when he saw them; did not know how large these coals were, wasn't any, he should think, over a quarter of an inch, and they were lying in the track where the fire had burned; possibly the coals he saw were a part of the tie; did not think he saw any coals as large as the end of his thumb that

(Testimony of W. R. Gribble.)

were disconnected and laying out loose, there were some as large as the end of his finger or thumbnail; some were loose, not attached to the tie, and they were just in the spot where the fire at the end of the tie had commenced, or had stopped burning, at the north end of the tie; it was not burned clear out, there were no live coals there at that time, don't remember of seeing any down on the ground, or on top of the ties, or of that particular tie, on the east or north end; the tie had burned over very near the whole surface, that is, the upper surface, of the tie, at the north end, the whole north end of the tie was blacked; he was over the line last May, did not see the same tie in there at the present time, he was not looking for it then.

Whereupon upon redirect examination said witness further testified:

That he meant that the rubbish was a quarter of a mile in one place; there were more or less places along where the brush had been cut and left down, he could not say positively just a quarter of a mile, it might have been a good deal more than that in places, it might have been less, and there might be quite a break or interval between the places; take a rocky ridge down near the railroad track free from brush growing on it; take some flats along where it was damp and there would be quite a lot of small brush where it had grown up, so it would just be in breaks—would not be a continuous string, it would depend on the surface of the soil; there had been brush grown up and had been cut down; some green

(Testimony of W. R. Gribble.)

brush growing then, not very high, but green brush all the time, looked like a continual growth; dry brush, mostly dry, places where it was inflammable and no water, that would be dry; other places where it was shaded or damp, that brush would be damp, it depended a great deal on the location of the ground; places where there was dry brush along the right of way were quite numerous between Berry and the water-tank, could not say *now many* places, or just the distances, but there were a number of places; the tie had burned on the top, and if he remembers right, the north side and down to where the tie was lying in the soil, at the north end; between the rails it had burned merely on top, but he does not know how deep it had burned in between the rails, but would say approximately a quarter of an inch, possibly not so much.

Whereupon upon recross-examination said witness further testified as follows:

That this young brush growing was located where the dead brush had fallen down, most of the places where the dead brush had fallen down there was green brush growing up there through it, and its thickness would depend a good deal—but different places it was quite thick; it followed along parallel to the railroad for some distance, it had simply been cleaned out from the right of way, cutting the brush back away from the rails so as to keep the road as clean as possible; this young brush had come up after the other brush had been cut off; the age of this young brush would run anyway from the season's

(Testimony of W. R. Gribble.)

cutting—that is what had been cut the year past, probably some was cut that spring—on back, he don't know how long; speaking of the young growth of timber, the green timber, he was saying that that had grown up from some that was just starting—probably where the brush had been cut down that spring; very little green brush growing there; from that on back, he don't know how many years; some places thick and rank and tall, where it had not been cut, probably for some time; could not tell the width of the tie, it would be about six or 8 in. surface, on top, could not tell how thick, he saw but did not measure it, it is usually about eight-inch surface, six or eight inches, supposed it was an ordinary tie, but don't know what width, or the dimensions, or its thickness, made no estimate or examination of it; just looked at it.

Whereupon it was admitted in open court that the defendant had succeeded to all the rights and interest of the Willamette Valley and Coast Railroad Company, and that the railroad company claimed this right of way there through what is called the McRae place. It is not admitted that the defendant is entitled to the one hundred foot right of way through the McRae place, and the admissions made by the defendant were for the purposes of this case and for no other controversy.

[Testimony of James W. Taylor, for Plaintiff.]

Whereupon plaintiff, to further support the issues in its behalf, called JAMES W. TAYLOR, who being first duly sworn, testified:

He lives at Detroit, Oregon, and has lived there for ten years; was living at Berry in June, July and August of 1906, and had occasion during those months to go up and down the right of way and track of defendant, making one trip during that time, right after the first fire started; thinks it was the next day after the fire of July 23d had started; it was either one or two days after the first fire started they were called out, fighting fire; they were fighting same fire for about five or six days; went down in a push-car and walked back to Berry, one trip down and back; thinks the time he was fighting fire was about five or six days, then they walked back, part of them and the rest took the car back; he walked from Cornford Ridge, that is just above the water-tank, to Berry, walked on the railroad track; in going from there up to Berry, he noticed the condition of the right of way or ground, near the track; there was plenty of dry brush, grass, and other combustible material; brush, grass, some ties—not very many—ties were mostly burned away, but there was lots of grass and fern and the like of that along the track, and it was dry, the summer had been quite dry, very dry; the fall rains had not set in at that time; there was just clearance for a train—these logs, grass and other combustible stuff.

(Testimony of James W. Taylor.)

Whereupon on cross-examination said witness further testified:

He was at the present time foreman of the Curtis Lumber Company; in 1906 was engaged, and is now working for the Curtis Lumber Company, at Camp 3, a mile above Berry; the Curtis Lumber Company was rolling logs down to the track at various places for the purpose of putting on railroad cars, on their own switch at Mill City; they laid the rollway and brought them in *their*; their work would not of itself bring down the logs or pieces of logs and bark, and leave them lying not far from the right of way, and sometimes on the right of way, it is off the main line altogether; laid, of course, on the switch, and taken out to the main line, so their logs and stuff doesn't disturb the track whatever; there was plenty of dead fern all along the railroad track as far as that is concerned, any place that he was on the track; it was not so much dry fern as that that had been cut down and left to dry, he supposed, by the section hands, although he did not see them cut it; there was some cut close by the Spaulding camp—the old Spaulding camp, if he remembers right, there was a place where some was cut there, and some right along by the Sower's camp above where they are now; these are the only two places that he could swear to; one of them was right close to where the fire started, east a little bit, but could not say how far; it was not burned over when he saw it; Sower's camp is east of the water-tank, about six miles, and Spaulding's camp is about four miles; these are the two places that the

(Testimony of James W. Taylor.)

grass and fern had been cut down, and the only two places that he noticed, and neither place had been burned.

Whereupon said witness upon redirect examination, further testified that he did not mean for the jury to understand that this dry grass and fern that was cut down was the only sort of dry and combustible material there was along the right of way there at other points; it was cut down, he thinks, that year; could not say as to any certain places having the same sort of material that had been cut down during previous years and left to lie there, he does not remember of any certain places more than the whole line, that was the general condition of the whole line, that is all he can say anything about.

Whereupon upon further recross-examination said witness testified as follows:

He did not want the jury to understand that grass had been cut down the whole length of the road that he passed over, and he does not mean to say the brush in places piled up against the track, or that there was any great amount of it; the general condition of the road at that time was more or less brushy along, and as to the grass that was cut, that was all he saw; it was just a small portion of the distance, and the brush was all along the line that he saw, it was cut down, not on the track, but near the track; he was not down below the water-tank.

Whereupon upon further redirect examination said witness testified that he was fighting fire—the fire of July 23d, and would say that it burned over

(Testimony of James W. Taylor.)

nearly a section, possibly not that much; in his crew he thinks there were about ten or twelve men, and in all, about fifty men; they dug trenches, cut down all rotten stuff, the like of that, that was in ahead, and packed water where they could get water, and throwed on it; dug about a mile of trench, cut through and dug ahead of the fire, worked from daylight until dark, didn't stop at the hours; has worked in the timber all his life, ever since he was big enough to go into the woods, and had occasion to fight fire before, forest fire; he was constantly there from the time he started, the day after the fire, until it was checked, and his work and that of the gang was necessary in order to prevent the further spread of the fire, and it did prevent it.

Whereupon upon further recross-examination the witness testified that he was working for the Curtis Lumber Company.

[Testimony of Daniel D. Bronson, for Plaintiff.]

Whereupon plaintiff, to further support the issues in its behalf, called DANIEL D. BRONSON, who being first duly sworn, testified as follows:

He lives at Washington, D. C., and was Forest Supervisor of the Northern Division of the Cascade Forest Reserve in July and August, 1906, and prior thereto, with office in Portland, Oregon; recalls the incident of a fire starting up there near or within the reserve on July 23d, 1906; he received a telegram while he was in Portland, on July 23d, from Mr. H. M. Guthrie, who was a Forest Guard in the Santiam Canyon; he replied to the telegram, and

(Testimony of Daniel D. Bronson.)

next day left for Detroit where the fire was—or near it—and arrived in Albany the evening of July 25th, and left early in the morning of July 26th; in going up on the railroad he saw where the fire had started, it was pointed out to him by Mr. Hoover, who was on the train; came back from Detroit on the afternoon train and stopped at the fire; found Mr. Guthrie, with two helpers, fighting the fire, and found that it was beyond the control of a few men, and went down to Mill City, he thinks, on a speeder, with Mr. John Ross of the Curtis Lumber Company, to obtain help; at Mill City made arrangements with the superintendent of the Curtis Lumber Company to allow some of his men to go up and fight on the fire, and the next morning, July 27th, they came up with these men and started fighting fire; also secured help from one of the logging camps, where Mr. Taylor was employed at that time; from July 27th until August 6th they fought this fire, employing from ten to 44 or 54 men, that he believes was the largest number they had at any one time; on August 6th the fire was checked, and leaving one man to watch some of the burning logs, so that they would not spread across—sparks wouldn't go across the trenches—they left the fire; he paid the men at the rate of twenty-five cents an hour, and then went over the mountains, across the mountains to another fire; on August 6th he went to the point where it was supposed the fire started, with H. M. Guthrie, Walter Gribble, Jack Norgen, Harold Fish; they found where a tie

(Testimony of Daniel D. Bronson.)

was burned or charred to the upper end of the tie, and then where the grass had been burned from that—from the end of the tie to a sloping log, which was charred; the outside was charred, the rotten part, and then up the slope, everything was burned beyond that point, up the slope; Mr. Hoover pointed out the place where the fire had started, it was right at the same place as near as he can remember, in going up on the train, at the point where Mr. Hoover pointed out; the stump was probably 12 or 15 feet, it was on a little rocky bluff, the rock goes up from the track, from the upper side of the track, and the stump was up there; the fire had gone up the slope of Granite Mountain for a long ways, probably half a mile, and from there the fire had jumped to Sardine Mountain, which was probably three-quarters of a mile away; and spread in all directions from the old burn on slopes of Sardine Mountain, inside the boundaries of the Forest Reserve; the whole acreage burned, he should say, was in the neighborhood of two or three sections, probably between two and three sections; that acreage was mostly in an old burn where there was a large amount of young growth, which was destroyed, and it would work into the green timber along the edge, and destroy the green timber—a tree here and there as it worked in, and those trees, a great many of them, were afire while they were fighting the fire; it required a great many men to fight that fire on account of its rapid spreading in this old burn—to check it before it reached the old slash or bench land

(Testimony of Daniel D. Bronson.)

toward the canyon; the fire was going away from the railroad; the slash was on the bench land, above the water-tank, that is, east of the water-tank, and that is where the fire was working down after spreading over all this area of Sardine Mountain—after making the jump to Sardine Mountain from Granite Mountain, that is kind of northeast of the water-tank, working toward the slash on the bench land; he was not there when it made this jump from Granite Mountain to Sardine Mountain, he got there in the afternoon, and it had already made this jump into the old burn, and was roaring like a cataract; he had had experience in fighting fires in Arizona, New York, North Carolina; had been in the employ of the Government for two years, and before that was in the employ of a cruising company for a short time; he directed the action of the men in fighting the fire, after he got there he supervised the fighting of the fire; and these directions which he gave were necessary to check the fire; there was other timber belonging to the United States, beyond the area of this fire, east, in different tracts, and a large amount of government timber in the township North.

Whereupon said witness was asked the following question:

Q. What sort of timber was that?

To which counsel for defendant objected on the ground that the same was incompetent and immaterial, which objection was overruled by the Court, the Court ruling that it was competent for the pur-

(Testimony of Daniel D. Bronson.)

pose of showing it was necessary in order to protect the timber. To which ruling the defendant then and there excepted, which exception was allowed, and the witness answered as follows:

A. As soon as it got away from this old burn, there was a good stand of red fir timber, with some hemlock in it; valuable timber.

Whereupon said witness further testified as follows:

That he paid these men that were working for him at the rate of twenty-five cents an hour, which including their coming and going from the fire; he also bought their supplies, furnished them with supplies and tools, that is, food and tools, and he arranged with the superintendent to get these men and to pay them if he would let them off from their regular work; this compensation of twenty-five cents an hour was considered reasonable; he paid these men \$614.50, and paid for tools and supplies for fighting the fire, \$95.99, and for travel \$7.30, that item is for his travel—for his railroad expenses from Portland to near the fire, he would not have gone up there if it hadn't been for that fire, if he had not received that wire, he had other business in Portland, and would not have gone there; he was finally reimbursed for this item, by check of the Assistant Treasurer of the United States, the United States fully reimbursed him; he paid these men in coin, and included the account in his expense account, and after several months he received a check reimbursing him for the amount in-

(Testimony of Daniel D. Bronson.)

cluded; he took vouchers from all the men, paid and submitted same to the Treasury Department, with his account, and the same was audited and checked, and check issued; the account for supplies and tools was also included in his expense account; submitted voucher with each bill; he went over the mountains after the first fire, and returned August 17th, and found that the second fire had started and was still burning; he returned August 17th, coming back from over the mountains; on August 18th he looked over the route to try and check this fire, to protect valuable Government timber in the vicinity of the Breitenbush trail, and on August 19th, he did the same down near Blowout Creek, or Volcano Creek, where there is valuable Government timber; on August 20th went to secure the services of some rangers who were at Lemiti Springs; returned with those rangers, and other rangers came in; with some additional help they fought fire until August 23d, when he left it in charge of a ranger, and returned to Portland; this effort was certainly necessary to protect the Government timber, and his expenditures were—for labor in that case, \$49.75, and for travel, \$4.65, and railroad fare back to Portland at that time. (Charge of each item was then withdrawn by United States Attorney.) The second fire burned over portions of tracts of Government land which were surrounded by alienated lands; in burning, the fire killed timber; the surface fire burned over a much larger area of Government land, back on the ridges; by surface fires he means

(Testimony of Daniel D. Bronson.)

fire that had not gone into the crown of the trees, that had stayed on the ground, and burned the underbrush, worked on the surface; the second fire, where it went to the crowns and burned all the timber, is this area here (designating on Government Exhibit 1) designated by this yellow line, being the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 11; N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 11, portion of SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Sec. 3, all of T. 10 S. R. 5 E. W. M.; SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 15, and portion of NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 23, and portion of SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 22; portion of S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ Sec. 22; W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ Sec. 21; portion of E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 20; W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 16; that in Section 16 has been reconveyed, but lieu selection not accepted; the record in Albany would show that it is United States land; this is not included in any of the estimates made under his direction, no portion of 16; these were the fires of August 11th, about which he was speaking; the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 17, and portion of SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 17, portion of W. $\frac{1}{2}$ of Sec. 17, portion of SW. $\frac{1}{4}$ of Sec. 8, portion of W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 7; W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 21; portion of E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 20; the fire of July 23d is marked by red line, and covers portion of N. $\frac{1}{2}$ of Sec. 5, portion of S. $\frac{1}{2}$ Sec. 6, portion of NW. $\frac{1}{4}$ Sec. 6, portion of NW. $\frac{1}{4}$ Sec. 7, portion of NE. $\frac{1}{4}$ Sec. 6, T. 10 S. R. 5 E., and portion of SE. $\frac{1}{4}$ Sec. 31, portion of S. $\frac{1}{2}$ Sec. 32, T. 9 S. R. 5 E., the western boundary of the Forest Reserve is shown in the green line; the north line of that township is

(Testimony of Daniel D. Bronson.)

not the north line of the Forest Reserve, the Forest Reserve extends to the base line, and north of the base line it would probably be a good many miles north of this, and it extends east probably 30 miles, could not give exact distance; the fire of July 23d started west of the water-tank, probably a little farther west than this red mark here, (designating) maybe just a little farther west, he could not say; that red mark may be just the point, but in that neighborhood; never measured the distance west of the Forest Reserve line, but in his opinion it would be about half a mile, half to three-quarters of a mile, maybe a little more, maybe a little less; knows the description of the land of the McRae claim, it is right here, it is this (designating on Exhibit 1); it is the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 20; it is a homestead, John A. McRae claim, 160 acres. (Witness marks McRae's place with a pencil on the map.) Could not state positively whether the cabin and bunk-house was in the west or east half; does not know; did not examine the timber, go over the ground after these fires, to see how great the damage was, but had his assistant, A. E. Cahoon make the estimates, and H. M. Guthrie, Forest Guard, helped him; secured full reimbursement for the \$49.50 paid for labor on these—on this second fire, from the United States, has the vouchers; the red line that is outside of the fire limit indicates the surface fire, where it ran on the ground, and south of that red line on the map means that it is Government land, all the

(Testimony of Daniel D. Bronson.)

red indicates the status of the land, as being Government land; the pink is not intended to represent the burned district, but simply the status of the land, also where the Government timber was destroyed by the last or any fire; he gave a notice April, 1906, to the defendant as to the condition of this right of way through the forest reserve, it was a letter addressed to John A. Shaw, one of the officers, secretary, of defendant, and he (witness) kept the regular office copy.

Whereupon the witness identified the office or carbon copy taken at the same time the letter was written on the typewriter.

Whereupon counsel for plaintiff offered said carbon copy of letter in evidence.

Whereupon, counsel for defendant waiving the objection that this was not the original, objected to the same on the ground that it is incompetent and immaterial, and is a self-serving declaration.

Whereupon, before making the final offer, counsel for plaintiff further interrogated said witness, who testified that he received a reply to said letter, and thereupon identified the original reply.

Whereupon counsel for plaintiff renewed said offer in connection with the offer of said reply, to which counsel for defendant objected on the ground that the said letter was incompetent and immaterial, and was a self-serving declaration; which objection was overruled, to which ruling the defendant then and there excepted, and an exception was allowed, and said letter admitted in evidence as

156 *The Corvallis and Eastern Railroad Company*
Government Exhibit 4, and is in words and figures
as follows, to wit:

[Plaintiff's Exhibit No. 4 (Copy).]

“Portland, Oregon, April 24, 1906.

“Mr. John A. Shaw.

Secy., Corvallis & Eastern R. R.,
Albany, Oregon.

“Dear Sir:

“Your right of way through the Cascade Forest Reserve in T. 10 S., R. 5 E. is reported by Ranger Harry G. Hayes as being in a very dangerous condition as regards brush, debris, rotting logs and ties, and is a menace to valuable timber owned by the Government on account of the liability of a spark from an engine starting a fire in this inflammable material which might result in great damage to other property by the spreading of forest fires thus started, in the dry season.

“I enclose a copy of his report made after making a personal examination, and also a few kodak prints taken by him to verify his statements.

“In view of this dangerous condition of your right of way, I will ask you to take measures as soon as possible to clean up this right of way, and until this is accomplished, during the dry season to maintain a fire patrol after each train.

“While such action on your part cannot be compelled under the present State or Federal laws, yet it would seem advisable for you to attend to this matter, both on account of the general good that would be accomplished by removing the danger to all property within a considerable distance of your

line, and also for your own protection, as it is the opinion of the Assistant United States Attorney that damages could be collected for property destroyed through your neglect in leaving this inflammable material on your right of way, and thus producing a menace to nearby property.

"I enclose copy of the opinion of the Assistant United States Attorney in this matter.

"If this right of way is not cleaned up by you in a thorough manner, and if a fire is started on account of neglect in not burning this debris, etc., resulting in damage to Government timber, the Government will at once take measures to recover full damages, on the grounds that the damage was caused by negligence on your part in allowing your right of way to be covered with inflammable material, which was a menace to the property of others.

"Very truly yours,

"(Signed.)

D. D. BRONSON,

"Forest Inspector."

3 enclosures.

Reply of John A. Shaw, marked "Government's Exhibit 5," is as follows:

[Plaintiff's Exhibit No. 5 (Copy).]

"April 26, 1906.

"Mr. Daniel D. Bronson,

Forest Inspector,

Customs House, City.

"Dear sir:

"Yours of the 24th inst. to hand relative to the condition of the right of way of the Corvallis &

Eastern R. R. in Township 10 South, Range 5 East. I have sent the correspondence to Mr. J. K. Weatherford, Vice-president of the company, who will take the matter up with our Superintendent.

“I will advise you as soon as possible in regard to what they will do relative to cleaning up the right of way.

“Yours truly,

JOHN A. SHAW.”

Whereupon said witness further testified that he never received any further reply to that letter; the condition of the tie which was pointed out to him by Mr. Guthrie on August 6th, it was partly rotten, and from inside the rail, nearer the upper rail, nearer the north rail—it was charred along the side of the tie; the upper side or the upper corner, out to the end of the tie, and from the end of the tie was a burned space burned across to a sloping log; that log had been partly burned—was charred up the slope; there was a char on that tie, toward the upper rail, from a point, as he remembers, between one and two feet—all of a foot probably about a foot and a half, inside the upper tie, inside the upper rail; by the upper rail he means the farthest from the river, the rail on the fire side; between July 27th and August 6th or 7th he went over the railroad track between the water-tank, or between the point near the water-tank that they used for a trail in going up to the fire line; went from there to Detroit several times during those few days, during that period; had occasion to observe the condition of the right of way from that point up to

(Testimony of Daniel D. Bronson.)

Berry; there was a large amount of inflammable material along the right of way, in places close to the track, consisting of old logs in places, and of dry grass and young fir brush which had been cut and dried out, and in places chips from hewing of ties and other debris that was dry, thoroughly dried out; did not particularly notice the condition of the ties of the track itself, although he remembers that there seemed to be a good many old ties, they were partly rotted, very old, seemed to be very old ties; did not especially recollect the condition of this McRae place, just casually noticed the cabin there, and the cook-house, that was before the second fire, as he would go back and forth over the railroad on the speeder, or on foot.

Whereupon said witness further testified upon cross-examination as follows:

He couldn't say exactly the place where the logs were that he refers to, just here and there along the right of way; going back and forth he noticed these old logs lying, they were not piled logs or just one—it was just a log or two here and there; not sawlogs, he could not call them sawlogs; they were fallen trees that had been sawed out, he should judge; does not recall that he saw a pile of sawlogs lying along there, somewhere, there was logging going on, there might have been, he don't recall a pile of sawlogs, very likely there were some sawlogs lying at different places along there, that had been left and were afterwards taken up and hauled to the mill; don't recall them; the road east

(Testimony of Daniel D. Bronson.)

of Mill City is not used almost entirely for logging purposes, there was a good deal of freight and passenger traffic, seemed to be a good many passengers; there were not any settlers above there much, after you leave Gates, just a few settlers along the river, all along the river there are settlers, very scattered; there are no large commercial interests up there, or agricultural interests, he would not call them large; it is a lumbering community, the lumbering interests predominate; it is practically all the industry there is there, besides the industries that are resultant from the logging interests, except in the summer time, as a resort place, East of Detroit—Breitenbush Hot Springs; there is no resort places along the river for fishing purposes; he is not a resident of the Santiam Canyon, and can only give his experience during that summer when he was there; very few people were fishing along that portion of the Santiam River, or in there for that purpose, they would go farther back, to Lake Marion, and farther east into the mountains; go on the train to Detroit, and pack in from there; farmers do not drive up there in wagons, there are no wagon roads, since the railroad went in, no way of going up and back except on foot or on the railroad track, or on horseback; the fire on east slope of the mountain, about twenty miles away, there was no railroad there, and this fire had nothing to do with that fire, that is the fire they have been talking about in this case, it was over thirty miles away, on the east side of the Cascade Mountains;

(Testimony of Daniel D. Bronson.)

the outside red, heavy line on this map (pointing to Exhibit 1) is the line of the surface fire represented on the map by Mr. Cahoon, showing where the fire spread; the damage that plaintiff is asking for does not go out as far as this red line, nor down here; (pointing to the map) plaintiff is not suing for anything out here; (pointing to map) or up here, nor until you get to where the marker was along there; there is a small amount of green timber that is included within the estimate; the yellow line (referring to Government Exhibit 1) encloses the land for which plaintiff is seeking damages, and these other lines enclose small patches of fire killed timber from this fire, from the second fire, the fire of August 11th, and this refers to the fire of July 23d; did not go over this timber, or the land, only at the time of the fire; the space between the yellow line and the outside red line is intended to include the timber where the fire has run on the ground, but did not damage the standing or growing timber, that represents the surface fire, where young stuff was killed, but not merchantable timber.

[Testimony of Jacob Merle, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called JACOB MERLE, who being first duly sworn, testified as follows:

Direct Examination.

Lives in Portland at present; was living in Albany in the summer and fall of 1906, and was machine-shop foreman for the Corvallis & Eastern, and had

(Testimony of Jacob Merle.)

worked for defendant from June, 1903, to August 2, 1909; machine-shop foreman is the same as roundhouse foreman, the engines come in there; he gave out all the work to the men that was to be done upon the engines of defendant, during the months of July and August, 1906, and had to do what he could himself, as foreman of the shops; the work of defendant was done by the machinists from the time he started in 1903, June, until 1905, along in October, by the machinists, both flue work and stack work; machinists and blacksmith and his helper, and while he was there, in 1905, October, to the fall of 1906, that work was given to the blacksmith and his helper—such as the stack work, and whatever he could do to the ash-pan, after receiving the orders from him; the machinists had refused to do it any longer in 1905, along in October; on some roads they have an experienced man as ash-pan and stack inspector, he is brought up to that work; and boiler-maker; some places he has had charge where the boiler-makers done it; at the present time the boiler-makers are doing it on the Corvallis & Eastern; he started railroading in 1878, and outside of about three years mining, has been railroading all his life; he was roundhouse foreman for a good many different roads, and machine-shop foreman; the only time during July and August, especially in July, just prior to the 23d of July, 1906, the engines of defendant that ran east up to Detroit—whether the ash-pan and spark-arresting devices were examined and repaired, if necessary, would be when the engineer would make a report of it on the

(Testimony of Jacob Merle.)

roundhouse report book; that book was a work report book where, whenever an engineer came in off his trip he was supposed, if any work was to be done on the engine, to report it, and he would go and see what he had to do, and give the work out to the men, or do it himself.

Whereupon counsel for defendant objected to any evidence upon the ground that the complaint does not charge that the defendant was negligent in failing to have a competent man to do this work, and the evidence tendered upon that subject is immaterial, irrelevant and not competent under the pleadings.

Whereupon the Court ruled as follows:

COURT.—I gather from the complaint that it charges the company negligently failed to equip its engines with suitable spark-arresters and apparatus to prevent the spread of fire and that it was also negligent and careless in allowing the engine to become out of repair so that it would drop coal and scatter cinders and by reason of this fact the fire started. With this view of the complaint, this testimony relating to the condition of these engines and their being out of repair, if there is any testimony of that kind, would be competent.

Whereupon counsel for defendant said:

Mr. FENTON.—That there may be no misunderstanding, your Honor, and that we may understand your Honor's ruling, I understand your ruling to be that the words "said engine to be out of repair" would be the clause under which the right is claimed

(Testimony of Jacob Merle.)

to prove that the ash-pan may have been out of repair?

COURT.—Yes.

To which ruling of the Court the defendant then and there excepted, which exception was allowed, and the witness was further interrogated by counsel for plaintiff, as follows:

Q. Now, supposing an engineer made no entry in that book, what was done with reference to examining the engine and putting it in repair?

A. None at all, in that time.

Whereupon counsel for defendant moved to strike out said answer as incompetent and not pleaded; whereupon the Court said:

COURT.—You may show by this witness what inspection was made of this engine, if any, and what examination was made, but if the company failed to provide rules requiring their man to put them in, you cannot charge negligence because it did not provide rules and regulation.

DISTRICT ATTORNEY.—All right, I will get at it.

Whereupon said witness was further interrogated as follows:

Q. What was the condition, Mr. Merle, if you remember it, of the engines or engine which run up to Detroit at or about the 23d day of July as to its spark-arresting or fire-arresting devices and apparatus?

A. After the engine being repaired, and being examined, and being reported several times, I

(Testimony of Jacob Merle.)

eventually found the stack in bad condition.

Q. Who reported it?

A. Mr. Simpson, the engineer.

Q. Who was he?

A. He was running engines one and two. We used to have two big engines and kept them for the east end of the run principally, and very seldom we would run a little engine on that run, because the work is heavy up there; and he was the man referred to.

Q. What report did he make?

A. Well, he made several reports.

Whereupon said witness further testified that these reports were made on the roundhouse work report book, the regular record of the company; that book was put there by the company, given to him to put there for the engineers to make report on, and the engineers would make such reports on the return of each trip, if he had any work to be done; lots of times they had no work to be done, and they just went right on home.

Whereupon said witness was interrogated and testified as follows:

Q. Now, do you remember whether or not engineer Simpson made such a report on the day of this fire—yes, on the day of this fire, or do you know?

A. Yes, sir.

Q. In this book? A. Yes, sir.

Q. After—on the return from the trip after the fire?

A. Well, he told me that they claimed that they

(Testimony of Jacob Merle.)

set fire. So that is all I—that is as near as I can say from the date of the book—that it is after the fire.

Mr. FENTON.—I move to strike that out as incompetent and not responsive.

COURT.—I will strike out the testimony as to conversation with Simpson.

Whereupon said witness further testified that the report book was missing in 1908, in the fall of the year; he went over in the morning—the book was there the night before; he went over to see if the man on the run had reported any work, which he done every night all the time he was there; does not know what went with that book, it was taken out of there that night, the book is gone.

Whereupon said witness was interrogated and testified as follows:

Q. Will you please state the condition you found that engine in after the July 23d fire, pursuant to the report made to you?

A. After the engine was reported, I examined the netting and stack; I told them it was pretty hot yet to examine—

Q. Never mind what you told them. Tell the jury what you found.

A. I got up and examined the engine with a torch. It was so hot you could not get in there, and the engine had to be used the next morning, and with a torch I could not see anything in the stack, because it was too hot to get your head down in there. I waited until about eight o'clock, trying to find the master mechanic, to report to him what had hap-

(Testimony of Jacob Merle.)

pened; and they asked me if I could see anything. I told them no, and they allowed the engine to go out the next day.

Whereupon said witness testified that this was after the fire.

Whereupon counsel for defendant moved to strike out all of that, for the reason that it is incompetent and immaterial, and that any conversation the witness had, or what he told any other person, would not have any bearing.

Whereupon the Court said:

COURT.—The conversation he had would not be competent in this case, but what he saw in the examination of the engine would be competent.

Whereupon said witness further testified that he went out on the following day; he reported the engine had thrown fire.

Whereupon counsel for defendant moved to strike out that; whereupon the Court said: "Counsel asks you what you did—what you know by your examination, not what somebody told you."

Whereupon said witness further testified as follows:

They had to work at it the following day and concluded to hold the engine and take the stack off the engine, and the barrel of the stack of this engine stands up maybe two feet on the inside, cannot tell how many inches, could figure it out on a blue-print map; it had no hole out in the bottom of the barrel of the stack to allow cinders to go into the smoke-box; the base of the stack to the top of the barrel was

(Testimony of Jacob Merle.)

full of cinders, and they were hot; he got down on the floor and took all these cinders out; searched the netting and could not find anything wrong with the netting; held the smokestack there all that day until late in the evening, waiting for the master mechanic to come and look at it himself, to see if he could see anything wrong with it; he didn't come, and about 7 o'clock that night he had the stack on, and told them, and let the engine go out; it went out a few days, and he had to look at it again—complaint made of the engine again; they concluded to take stack off and put another one on, and they done so, and shortly after this other engine that had this stack, it was reported, and he got up on this engine and looked at the stack, and found between the casting of the trap door, where the man that had put the netting in didn't have material enough to reach over to the flange, consequently he could take his rule by opening it two inches single thickness—two foot rule—and put it between the casting and the netting; he went to work and got some pieces of netting—the engine had to be used—and put in three different pieces, he thinks; they have six courses in that or more—the same stack went on the second engine; on that engine at that time he put them in and flanged them out, and that stack was all right after that. Consequently he concluded there was trouble with the stack; he had taken that stack down before that and put two holes—had a machinist drill two big holes in the barrel of the stack; first thought that was the cause, and after the holes were cut in, and made the same as the other

(Testimony of Jacob Merle.)

stacks, there were still complaints made, and after that he located the trouble under that trap-door between the lower casting of the trap-door—the base, and the netting, and he fixed it; was up at Breitenbush Springs after the second fire, talking about it, one thing and another; it was after the second fire that he located that stack, but there was another stack reported on another engine afterwards, on two or three engines that run up there; engine 2 was reported, it had been running up there; engine 1 was reported again, and found in bad condition.

Whereupon said witness was further interrogated and testified as follows:

Q. Now, on these examinations, what condition did you find the ash-pan of this engine in? That is, the apparatus underneath to—

Whereupon counsel for defendant objected to the same as incompetent, and as not pleaded; whereupon said witness answered:

A. Mr. Walsh had come and asked me to look over the ash-pans at that time, and we found the ash-pan netting—after looking at the stack and everything, he insisted on looking at all the ash-pans; they looked at engine one's ash-pan and the netting did not come up to the mud rim by two inches—the piece of netting; the ash-pan is maybe from eight to ten inches deep, and the netting came—it is bolted on with three bolts in the bottom of the ash-pan, two bolts on the side. There was a space of two inches. He looked through the wheel himself. He insisted on my putting a piece of netting across. We did not

(Testimony of Jacob Merle.)

bolt it on but sewed it on with wire, and it remained in that way that season;

Whereupon said witness further testified that there was nothing between this mud ring and the piece of netting when the damper was open; when it was shut, the damper was closed. There was an aperture for the escape of sparks and coals—you could put your arm through it—the full length of the shpan, full width of it; in one corner of that part the ashes had accumulated all around, they were kind of hot, and it bucked it up; he corked in asbesto, and kind of fixed it down.

Whereupon counsel for defendant moved to strike out all of the foregoing testimony referring to the ash-pan, as hereinbefore set out, upon the ground that same is incompetent and not pleaded, which motion was overruled, and exception allowed.

Whereupon said witness further testified that he found a hole under the trap-door casting and the stack, base of the trap-door casting and the netting; did not examine the stack door itself, examined the netting and this underneath, it was a hard thing to get to; there is no other trap-door except the one below there in the stack, in any of the nettings and stack, there is only the one trap-door in the netting; the trap-door is faced and set on with hinges; the trip before that they found a hole in this netting, this was the day before the first fire, was the trip before he examined the netting, as near as he can remember, immediately before the fire; the trap-door netting was in bad order, and he repaired that there on the

(Testimony of Jacob Merle.)

23d or 24th, it might have been the 22d, it was the trip before that, the trip when it was reported for the fire; he repaired it when he examined it that time, repaired the trap-door before the fire.

Whereupon counsel for plaintiff asked said witness the following question:

Q. Now, then, were you an experienced man in the examination and repair of stacks and apparatus?

To which counsel for defendant objected as incompetent and not within the issues; whereupon said witness answered:

A. I would like to rectify that statement. I had that door fixed. I didn't do it myself, I had it fixed, I put it up.

Whereupon said witness was asked the following question:

Q. What I am asking is, in the examination and keeping in repair of the stacks, if you were an experienced man in that business, and knew how to do it?

Whereupon counsel for defendant objected to the same as incompetent, and not within the issues made by the pleadings, and because the witness said he did not do it, but had it done; which objections and each thereof were overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

A. I never had to do it in my life, only being around seeing men do it.

Whereupon said witness further testified that he understood the mechanism of fire-arresting devices thoroughly.

(Testimony of Jacob Merle.)

Whereupon said witness was asked by counsel for plaintiff, the following question :

Q. Now, that—how was it that that stack was allowed to get in that condition, then ?

To which counsel for defendant objected as conjectural, speculative and incompetent, which objection was overruled, and an exception allowed, and the witness answered :

A. Having no man detailed to examine the engines on their arrival on every trip, consequently they were never examined until the engineer reported them.

Q. Reported them how ?

A. Reported that there was something wrong with the engines—with the stack.

Whereupon counsel for defendant moved to strike out said evidence as tending to charge negligence not charged in the complaint, and as incompetent ; whereupon the court said :

COURT.—Incompetent to charge negligence in the matter of failure to provide suitable employees, but I think it is competent to show the condition of this engine, and his knowledge of that condition—how it got to be in that condition.

Whereupon counsel for defendant said : “The point made is, it makes no difference how it got to be in that condition if it was in that condition. For that reason the witness ought not to be allowed to say because the company neglected to do this, that and the other ; which motion was overruled, and an excep-

(Testimony of Jacob Merle.)

tion allowed, and the testimony remained with the jury.

Whereupon said witness upon cross-examination further testified as follows:

He had been a machinist for some time; have followed the machinist's trade since 1876; left home in 1878, followed the journeyman's work since then; been master mechanic in several places, for railroads; came from El Paso, Texas, to Yaquina, and from there to Albany; before he went to Texas he came to the coast several times, was over the O. R. & N., was in Seattle, San Francisco, Sacramento, Carson, Nevada, all over the Southern Pacific and all their shops, all around, and worked in a great many of them; was not given entire charge of the mechanical department of the Corvallis and Eastern Railroad when he got there; was appointed machine-shop foreman, as the bulletin read; there was no bulletin to the effect that after Mr. Walsh ceased to be foreman of the shops, he became foreman and manager, he had the same charge when Mr. Walsh ceased to be there, he was master mechanic and everything; was the same position—machine-shop foreman, never was appointed master mechanic, and did not perform that function; the same function as when he started, and as such, foreman; witness thinks he could tell when an engine was in proper repair, or in proper condition to go out, had always complimented himself for being careful, and for his ability, and was careful, and tried to perform his duty, always; he is not working for the defendant at the present time; did not

(Testimony of Harry G. Hayes.)

quit, but his pay ceased on August 2, 1909; is now living at Portland, at present working for the White Automobile Company, as machinist.

[Testimony of Harry G. Hayes, for Plaintiff.]

Whereupon plaintiff, to further support the issues in its behalf, called HARRY G. HAYES, who being first duly sworn, testified on direct examination as follows:

He was engaged in ascertaining amount of timber destroyed by fires of July 23d and August 11, after the fires, accompanied by Mr. Cahoon; they chained the distance and estimated the timber burned destroyed by the fire; took into consideration all the timber of any size considered merchantable; considered a tree of merchantable size which was as large as one's body, and on up, as large as they grow; am not positive of the sections, but think it was near section 17, in or near that, where the timber was examined, it was just in one section, one locality, but cannot say it was all in one section, it has been four years since he was there, and have forgotten a good many of those; was engaged two days special work with Mr. Cahoon; did not on these occasions measure the logs, just estimated them like an ordinary cruiser would, and both put down the estimate—each put down his own estimate—and he turned his over to Mr. Cahoon in the evening; prior to that time had been in the Forest Service twenty months, and during the winter months a great portion of the time he cruised and estimated claims; that was two winters, and he could say five months' experience with the Government, in

(Testimony of Harry G. Hayes.)

two years, and he had cruised some prior to that time, in a similar locality, up in that section of the country; from his experience in cruising timber he could accurately determine the size of logs without putting a rule on it, or calipers; he took into consideration fir, hemlock, mostly fir, some hemlock, and a little cedar scattered through that section.

Cross-examination.

A cruiser can go into a forest without the use of a caliper and without triangulation or measurements of any kind, look at a tree, and tell approximately how many board feet it has, board measure; their estimates of that kind are accepted every day in this State; there are a number of systems that are accepted by everyone; timber lands are bought and sold with the understanding that this method is as near reliable and definite as they can get, and he has heard of sawmill men and lumber dealers buying timber by stumpage that way, they do this in different localities, in that locality they have; this is done by the Curtis Lumber Company; a man has a claim and they estimate the stumpage, and buy it in gross, make their estimate the best they can, that is done when they buy the entire claim; if one were selling timber by board measure, so much per foot, the trees would have to be cut down to get a better method; do not in all instances caliper the trees at the base; and then make a guess at the top of the tree, and thereby get pretty near the accurate measure; never knew of anyone buying by board measure, standing trees, and they did not measure any trees by board measure on

(Testimony of Harry G. Hayes.)

this special occasion; never knew that cruisers, and the very best of cruisers, would vary from five to ten million feet on a forty as an estimate in heavy timbered land, and it would not be considered a very good cruiser, on an average claim, if they vary from ten to twenty-five per cent; a claim of forty million feet would be a pretty good claim, but there is none that good in that section, not in that country, to his knowledge, nor has he been in any such timber, and he expects cruisers would get excited if they got into a claim carrying forty or thirty million feet; if there was a claim of ten million feet, cruisers would not vary 25%, if they were good cruisers they would not vary 10%; he hardly thinks they would vary that amount; his cruising was principally in that section; he cruised with R. N. Hoover, in that section, cruised probably twenty forties, altogether, with Mr. Hoover, also cruised some near Mount Hood; the highest stand of any forty that he found on any forty in this section would be about twenty million, it would run about five million on a forty, twenty on 160 acres; the average would be less than ten million to the claim, where he cruised with Mr. Hoover, less than two and a half million to a forty; before he went up there to cruise he was employed by Meier & Frank Company, three and a half years, assistant superintendent, in charge of the help over the house, and his duties as such required him to supervise the help; during the three and a half years he had five or six hundred men and girls under him; never did any cruising until he went up there, and that is the only experience he had ever had.

(Testimony of Harry G. Hayes.)

Redirect Examination.

He made no estimate of the amount of timber that was destroyed on that section—section 17—he could not remember the figures.

[Testimony of A. E. Cahoon, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called A. E. CAHOON, who being first duly sworn, testified as follows:

Direct Examination.

Lives at Eugene; has lived there since May 15, 1908; in July, 1906—July 4, 1906—he went to Detroit, and remained in that vicinity until July 20th, when he returned to Portland; after that he went back into the mountains, into the northern part of the Oregon Forest then Cascade North, and did various lines of forest work; October 10, 1906, returned to that vicinity, the vicinity of the fire of July 23d; was not in there during those fires; on October 10th went back to estimate the timber and determine the damages caused by the fire; has been employed in the Forest Service since May, 1900, and had experience as timber cruiser and estimator of timber, prior to October, 1906, and since he entered the service in May, 1900, in different parts of the United States—North Carolina, Western New York, Texas, Missouri, Idaho, Wyoming, South Dakota, California, and Oregon, and prior to 1906 he followed the work of taking dimensions and estimating the quantity of timber on different sections of land, and at different times since have been in Oregon during the last five years, from a few days to a few weeks—

(Testimony of A. E. Cahoon.)

sometimes a month or two or three months; in Texas for about four or five months, in Arizona for three summers, four or five months in Northern California; that experience covered burned tracts of timber prior to this time; he cruised and estimated the damage and injury by fire in nearly all these states—chiefly in South Dakota; these were large burns in these states, where he estimated the timber; on October 10, 1906, he equipped himself with a compass and surveyor's chain and calipers; these calipers consist of a stationary arm at right angles to this shaft, the shaft is graduated into inches and tenths of inches; there is a removable arm on the shaft, and as you place this around the tree in this manner (illustrating) of course you can get the diameter by moving this with the right hand, if you are right-handed; had a note-book, and one assistant, H. M. Guthrie; they went down to the lower end of the track at the west boundary, by the water-tank, and first examined the Sardine Mountain fire; before beginning estimating any timber he located himself with reference to the section or quarter corner, and then with compass and chain ran what they call strip acres; there are different methods of estimating timber, and this one is employed by the Government as being the most accurate; a strip acre is a chain wide and ten chains long, and these strips are run by compass lines, and the timber is measured with these calipers at a point four and one-half feet above the ground, commonly called breast height, and these diameters jotted down; in the first place, before

(Testimony of A. E. Cahoon.)

figuring these estimates he went over the tract in order to get a fair knowledge of the timber, so as to determine where and at what point to begin running these lines; divided his sheet—estimate sheet—into different classes, namely; red fir sound; red fir—that is red fir dead, and red fir cull; hemlock—cedar; timber in estimate includes timber fourteen inches and over, in diameter, at breast height; in running these strips the timber is measured on each side of this chain for a distance of 33 feet, the entire distance across the tract, and when his assistant called out 18 inches, or 20 inches, he jotted that down, and at the same time casting his eye upon that tree, and examining that as to whether or not it was a cull tree; examining the punk, knots if there were any, or other physical factors, which should determine whether or not it should go into the cull class or merchantable class; trees containing less than 50 per cent cull—or 50 per cent merchantable timber, were not included in this estimate; for instance, they came to a tree and it contained three logs, and if two of these logs by the punk or fungus disease appeared to place them in the cull class, as cutting less than 50 per cent merchantable timber, he would ignore it altogether—let the one log of merchantable timber go; no estimate was made of a small reproduction, seedling, two or three feet high—ten feet high; nothing under this 14 inches in diameter was included in this estimate; in working up the estimate used what they call experience or volume tables; these are based upon thousands of estimates of timber, for example,

(Testimony of A. E. Cahoon.)

they have a table showing diameters of the different trees; for instance, going into logging camps, as a tree is felled, they take the breast height diameter, 4½ feet from the ground; they measure thousands of trees of different diameters, or of each diameter; find they have 400 or 500 trees, 16 inches in diameter, perhaps 800 or 900 19 inches in diameter; 400 or 500, 21 inches, 22 inches, and so on; by averaging these they know the volume in board feet for each diameter, because that is scaled by the log scales as used on this coast, the one employed by the Government, which is a "decimal C rule," and from that table they know—in working out this estimate on the sheet, he would have, say 40 trees 20 inches in diameter; he looks at his table opposite the 20 inch class, and finds that that contains so many board feet; therefore it is a simple mathematical calculation as to the volume in all of those 20 inch trees; he does that for each diameter class; all of these figures are actual measurements, and are not guesswork, but are based upon several thousand estimates—measurements, of each diameter class; there was, within the area of the Sardine Mountain fire, 200,000 feet, board measure; this was the fire of July 23d; the Sardine Mountain fire covered a portion enclosed by this boundary here (pointing to map); this was for the most part an old burn; this is portions of sections 6 and 5 of T. 10 S. R. 5 E., and portions of sections 31 and 32 of 9 south, 5 east (pointing to map) the merchantable timber was along this boundary line where the fire had eaten into the green timber here and

(Testimony of A. E. Cahoon.)

there, in different places along the boundary line of that fire; it occurred over the entire boundary line of the fire, within the Forest Reserve; there was merchantable timber along this line, as it nears the railroad track, here and there one would find merchantable timber, scattered at different places there where it had gradually encroached upon the green timber; before estimating the timber destroyed by fire, this fire, he made an estimate of timber for a proposed sale, which was in this same section of the country; he knew the claims, had heard a claim had sold for different prices per thousand feet—the price of timber is influenced by the cost of logging and quality of the timber, in other words, it is quality and location, and transportation; when estimating this timber for the purpose of sale, they estimate the cost of logging—of putting those logs to the mill and from that they are enabled to establish a price for the proposed timber sale; they had offers as to what it would bring at sale, but he cannot specify any definite transaction, but he can say that he knew the market value at that time, at that locality, but he never examined the records to determine the price of timber, never bought or sold any timber in that locality; he has known of particular instances in which people refused a certain sum for the timber, but the sales he knew of were those which he heard about, he did not participate in those sales; the value of timber is based upon its value and accessibility, but does not know of any definite transaction, what the mills would pay for merchantable timber, in that locality;

(Testimony of A. E. Cahoon.)

simply heard what the Curtis Lumber Company and Hoover Company were paying; he made an estimate of all the timber destroyed by fire, in the same manner as explained, and went over each subdivision that is marked on the map, and measured it up in the same way; in section 3, a portion of section 3, T. 10 S. 5 E. there was 422,500 feet of second grade fir; in sections 15 and 23, portions of those sections, same township and range, there was 1,294,000 feet second grade fir; in section 22 there were 3,247,272 feet second grade fir, 2,110,416 feet hemlock; these figures are from measurements made by him at the time, an exact typewritten copy, the original is the same as the typewritten copy, the typewritten copy is easier to read; in sections 7 and 8 and 17, hemlock, 104,600 feet; red fir, second grade, 1,318,413 feet; red fir, first grade, 3,422,230; the total in that fire was 3,022,230; this was the Berry fire of August 11th; by second grade he means to include timber some distance—farther back on the slopes from means of transportation, and of inferior quality; in other words, second grade was that class influenced by quality of timber and the location; if it was very far back upon the high slopes where the cost of logging would be greater, it was put into the second grade, quality and location influenced that, and when he says second grade fir he does not always mean fir that would make second grade lumber; when a tree has a short bole and some large limbs on it and knots, that would of course not sell in the market as first grade lumber; first grade timber was that located near the

(Testimony of A. E. Cahoon.)

railroad in sections 7, 8 and 17, which was a downhill pull to the railroad or to the river—easy logging; all the balance, except in these sections, is indicated as second grade stuff, in both fires; in the whole amount of timber there was a total of 3,422,230 feet of first grade timber, and the remaining is estimated as second grade.

Whereupon on cross-examination said witness further testified that he began making this examination October 10, 1906, and was there about four weeks, had one assistant at first, and towards the last had a second assistant for a couple of days; at the second fire, August 11th, known as the Berry fire, all of the timber was calipered when this estimate was being made, and when Mr. Hayes was with him on this Berry fire they used the calipers and put down these estimates as they were called out; he had one man helping him when he made the greater portion of the cruise, that was H. M. Guthrie, who was on the witness-stand yesterday; in making the examination of this timber, he ran these strips, called sample acres, over all of the fire-killed timber at intervals; did not estimate any timber on the logged off lands, and could not say as to the area of the logged off land, because there is patented land there, did not pay any attention; did not cruise any in sections 5 and 6, T. 10 S. R. 5 E.; it is not possible to say how many acres he cruised in sections 5 and 6, trees here and there, scattered, he therefore did not cruise acreage, but cruised individual trees as laying along the boundary line in the Sardine Mountain fire; these trees were

(Testimony of A. E. Cahoon.)

in sections 5 and 6, they were killed by the fire, but were standing, it is difficult to say how far apart they were, they would be scattered along the boundary line, along the edge of the red line there, perhaps be one here, one there, and then go on quite a little distance and *he* some more; they were not scattered all over the quarter section in section 5, or over the whole section, but were along the boundary line (indicating on map); he grouped the entire estimate of those sections where covered by the Sardine Mountain fire—within that fire, and could not tell how many were in section 5, because he paid no attention to that imaginary section line there where he crossed it; that is, if he had a few thousand feet in one section, he did not make a distinction as he crossed over into the other section; in the Sardine Mountain fire the merchantable timber was on the edge of this burn, and there was no merchantable timber back in over the section; it was where the fire had eaten into the green timber, and in those sections covered by the Sardine Mountain fire, there was 200,000 feet, all fir, second grade; it was called second grade stuff because of its distance from the railroad or river, it was far back on the hills; does not mean to tell the jury that if it had been a few miles further back, it would have been third grade, or fourth grade, or that that is the way he cruised timber; he means to say that the timber in that burned area was classed by him as second grade because if all of that timber could have been marketed, most of it 75% of it, would have gone as first-class stuff; there were

(Testimony of A. E. Cahoon.)

a few trees that were limby and would not cut out first-class lumber, the quality of the logs influenced that; there was not a lot of punk on it, as well as limbs, once in a while he would see a small show of fungus, and the limbs did not grow close to the ground; found no large knots on the bole of the tree, that is, what would be considered merchantable; in the top of the trees found large limbs which would extend down for a distance, but no big knots or not much punk—just occasionally; it was second class on account of location, although he does not make it second grade on account of location only; in placing a grade upon timber, you take into consideration its quality; second grade is not a trade name, but simply used here as second grade because of its location over way back on the slopes; quality has something to do with it, as being first or second grade, in classing timber; sections 31 and 32, T. 9 S. R. 5 E. were included in the first fire, and this was cruised the same as he did in sections 5 and 6, examined the entire area as outlined by that red line, it was a little farther away to transportation than the other; that country up there in those sections, up on the heads of those streams, is very much alike, very little difference, topography is about the same; the percentage of timber on the slope would vary in places, some places it would be steep and other places you approach the crest of the ridge—it would not be rolling, and not so steep, that is toward the top of the mountain; he paid no attention to breakage in that particular locality, in that line, and if one is working in logs,

(Testimony of A. E. Cahoon.)

where there are cliffs, etc., where you have a large percentage of breakage, perhaps some cruisers may give credit, but he did not; it is not true that if the trees fall at this point that they will immediately slide all the way down the mountain to the river, they have not done so from the top of that mountain to the river, it is a physical impossibility; in places where the slope goes right down to the river, they would slide down, of course; he cruised 84 acres, in section 22, T. 10 S. R. 5 E.; this timber was not scattered pretty well over the section; as indicated by the line on the map, it was all killed by fire at that time; the southwest of the northeast, and the southwest of the northwest; does not know when fire had killed it; no green timber in that estimated area, there is green timber in section 22, but is not in this estimate; that was fir and hemlock, 2,110,416 feet of hemlock which was not solid, but interspersed among the fir; the hemlock was second grade, because of its inferior quality, in comparison with fir, as it commonly sells in the market, it was a good quality, for hemlock, but was classed as second grade because it is not as valuable timber; the hemlock would be first-class, but it was classed as second grade, because it was second grade in comparison with fir; classes were established by the prices, that is, they have two prices, a second grade of one price, the first grade at another price; some fir classed there was second grade; hemlock ought not to be classed as third grade; in sections 15 and 23 there were 47 acres estimated, containing 1,294,000 feet board measure; the two sections were

(Testimony of A. E. Cahoon.)

grouped together; in section 23 it shows portions of the northeast of the northwest quarter; those two sections, 15 and 23, were grouped, and represent 1,294,000 feet, timber being of the same class was grouped together, it was all second grade excepting one, it would have been impracticable to group it all together, all there was in that fire; there is a distance between the two bodies of timber, a short distance apart, approximately across one forty, from 15 to 23; hemlock was chiefly found in section 22; found in sections 7, 8 and 17, 1,318,314 feet, in portions of those three sections, as is shown by those patches on the map; there was some first class in these three sections, amounting to 3,422,230 feet; in those three sections there is 104.6 acres, estimated cruise, it does not lay in solid form, it is in patches as shown by the enclosed areas there on the map; the three sections mentioned were grouped together; cannot state how much he found in NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 17, and he cannot show what part of the forty is included since they were all three grouped together, represented by these small patches; the first-class timber was down on the lower slope, near the railroad, it was classed as first grade material; he kept no account of the first class in each little legal subdivision, but grouped the three together; the first-class timber is embraced in these enclosures in sections 7, 8 and 17, on the lower slopes, towards the railroad were classed as first grade material; there were 360,000 feet in the enclosure marked, on the west side of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 17, and on

(Testimony of A. E. Cahoon.)

section 7, on the west side of the northeast quarter thereof, 576,000 feet, but he cannot state how much of this was second class, on account of the grouping; it was all fire killed timber that was cruised; the merchantable timber that was estimated was all standing, the bark was still intact; now and then a tree would be found that the bark had slipped off, but the fire had gone up into the tops, what is called a croen fire, and had destroyed the needles, killed the tree; the material was not all consumed and gone up in smoke, occasionally you would find a tree where the fire had eaten into the shaft of the tree, but the timber that was estimated was all killed by fire, and for the most part the bark was intact; it was merchantable timber, but he could not say it was perfectly sound, it was what would be considered merchantable material; the time in which burned timber would stand without deteriorating in value varies in different countries, and is influenced by climatic conditions; of his own knowledge he would say that sapwood will deteriorate in sometimes from one and one-half years to two years, that is, it will be unmerchantable in that length of time, the heart wood will be sound; you can see this most any time in passing through the mountains, or any of those old burns, or recent burns; take some of the old burns, like that up in the Coast Range of Oregon, where the sap wood had deteriorated and the heart wood is still intact and sound, in places where the tree is standing; take a 24 foot log, which has a diameter of 26 inches, there would be 30 per cent sap, 30.7% sap; he is acquainted

(Testimony of A. E. Cahoon.)

with the Santiam region, and knows there has been a timber sale made for dead timber in that vicinity, killed by fire, but cannot say that the Curtis Lumber Company is logging it off there, off their own ground, didn't personally see them, but saw logs coming in on the train there, but cannot say whether these logs were burned or not; where he saw the logs on the train it was within this burned district, but he doesn't know they were cut from burned trees, didn't see them; never operated a sawmill, and therefore would not know as to the lumber end from personal experience.

Whereupon on redirect examination said witness further testified as follows:

That the price placed upon this timber was determined upon its location, and timber lower down near the track, where the cost of logging was greatly reduced, would be from one-third to one-half as much as it would be farther back—that timber would be classed as first grade; he cruised altogether 242.1 acres, that was in the second fire; this 242.1 represents the entire area of timber destroyed which he estimated; that was in sections 3, 7, 8, 17, 22, 23 and 15; the timber he cruised was not any considerable body, he did not go around and hunt up the burned trees; he measured the distance and calipered the timber; that is an entire compact burn represented in that area; it is south of the tracks, enclosed by the line on the map.

Whereupon counsel for plaintiff asked said witness the following question:

(Testimony of A. E. Cahoon.)

Q. I will ask you what difference there was between the price you fixed upon them between the first grade and the second grade?

To which counsel for defendant objected as to the price, because he has not testified to price; which objection was overruled, the Court permitting the witness to testify for the purpose of showing the theory upon which he graded this timber; to which ruling the defendant then and there excepted, and the witness was further interrogated and testified upon said subject as follows:

A. The difference between the two grades?

Q. Yes, and I will ask you what you placed upon the first grade and what you placed upon the second grade?

Mr. FENTON.—What price?

Mr. McCOURT.—Yes.

A. Fifty cents per thousand feet for the second grade and \$1.25 for the first.

COURT.—Do you remember what was the largest single area of compact timber that was burned that you estimated? A. Single area?

COURT.—I mean compact.

A. 104.6.

COURT.—Was that all covered?

A. All burned, yes, sir.

COURT.—I understand that.

A. In compact body?

COURT.—I mean where the timber that you estimated was compact. A. Yes, sir.

Q. Well, no 104 acres in one single place?

(Testimony of A. E. Cahoon.)

COURT.—104 acres in three different sections?

A. — Yes, sir.

Q. But they were separated by a forty here, so it would not be compact.

COURT.—That is what I am getting at, whether this 104 acres was scattered all over these three sections.

A. As represented by these patches enclosed there by the red lines.

COURT.—Well, did you find in any place, say, an area of timber that was compact, merchantable timber that was burned? A. Yes, sir.

COURT.—All covered with timber, or scattered trees?

A. All covered with timber, the entire area.

Whereupon said witness further testified that there was 27.6 in that tract there (pointing to map) which contained 1,380,000 feet of timber; in section 17, beginning in section 8, in the northwest quarter of the southwest quarter—that portion there is 9.6 acres, and in the lower end of the same subdivision 2 acres; in upper area, in southeast quarter of southwest quarter, two acres, and in upper area in northwest quarter of 17, one acre; 12 acres in area below that; 16 acres in territory indicated by circular line north and south of the line between the southwest and northwest quarter of 17; 8 acres in circular area in northwest quarter of southwest quarter of 17, and 12.8 acres in lower circular area in west half of northeast quarter of section 7; 6.4 in upper territory included on map in same subdivision; he has no esti-

(Testimony of A. E. Cahoon.)

mate of timber on Government land shown in east half of Sec. 17; no destruction there by fire, only small stuff under fourteen inches, and made no estimate on that; there were 47 acres in Sec. 15 and 23; the entire triangular piece shown in section 23 was within the burned area, amounted to 7 acres; the southeast forty of the southeast quarter of 15 was included; outside of these areas, in sections 7, 8 and 17, they were burned over, and between these different patches represented by the pink, there is timber, green timber, it shows that the fire up here burned in patches and did not consume the entire belt of timber; there was timber lying between these burned areas and the railroad or the river, or such point as there might be a terminus for transportation; the timber on the north and east slopes was of good quality; the lower slopes would be classed as first grade, but higher, up around in through here (pointing on map) would be classed as second grade, based upon these prices; the timber burned in sections 5, 6, 31 and 32, approximately 200,000 feet, was good, merchantable timber; that enclosed within the line is an old burn, and with reproduction going on, small trees, seedlings, saplings, pole-like in places; that mountain there is an old burn, no merchantable timber except back where the fire had encroached on the edges; coming down around through these sections is good timber, and up in there (pointing on map) is good merchantable timber, with patches of pole wood here and there, small trees, 14 to 16 inches in diameter, such as telephone and telegraph poles; tak-

(Testimony of A. E. Cahoon.)

ing that as a whole, if the timber had been logged before the deterioration of the sap wood it would have been merchantable timber on all the trees where the fire had not eaten into the shaft of the trees—on which the bark had not slipped; the trees where the bark had slipped and the fire eaten into were only a few here and there, and it was impracticable to keep any count of those individual trees; the timber as a whole was good merchantable timber, after it had been killed by fire, if it had been logged before the sap wood had decayed; within three years sap wood is of no value, has no merchantable value; the trees which were included in his estimate had not burned into the bark at all, the timber estimated included only the merchantable timber; the trees that had been eaten into by fire was not taken account of, where the shaft had been destroyed in places up and down the trees; could not say that some of them possibly never merchantable; at the time of the fire some of them possibly were not merchantable, some were, and some were not; ordinarily the fire does not eat into green timber to any extent unless it is a very hot fire, hot crown fire; if there were any trees that had been sound before the fire, they had been utterly destroyed; they were very few.

[**Testimony of W. A. Hoover, for Plaintiff
(Recalled).]**

Whereupon the plaintiff, to further support the issues in its behalf, recalled W. A. HOOVER, who having been duly sworn testified on direct examination as follows:

(Testimony of W. A. Hoover.)

Is not engaged in any business at present, but has been engaged in lumbering at Detroit, with the Hoover mill, from 1896 to 1906; lived there in that country in 1906, at the time of these fires; had been buying and dealing in timber by the quarter section, in the tree, and thinks he knows the price or market value of merchantable timber in that locality at that time; he bought several pieces and knew what they were selling for, and what it was worth; it is owing to locality and quality of the timber, what the price would be; if it would be hard to log, of course the price would be less than if it was handy; it would run from sixty cents, to \$1.50 per thousand by the quarter section; just fix a price, so much, and cut it out, that is about what it would bring per thousand; within a year after the fire had gone through it, the sap would be gone, the worms would be in it, in the sap—through the redwood; that is in a year or two, probably less time, and he would not care about buying it without he had a mill and could use it right away; he did not buy any quarter sections of that kind, and log them while he was there, and does not know of any being bought or sold in there while he was there.

Whereupon counsel for defendant moved to strike out all of the testimony of said witness in regard to market value of burned timber, which motion was overruled, and an exception allowed, and the testimony remained.

Whereupon said witness further testified that he was never on that part of sections 7, 8 and 17, T. 10 S.

(Testimony of W. A. Hoover.)

R. 5 W., which were burned over in the second fire, lying pretty fairly to the railroad; he had been down along the river, it is hard to say what that timber would be worth in that locality, if the land was covered with good timber, considering its accessibility, the timber looks pretty nice from the railroad, where burned through, and it ought to sell at \$1.00 per thousand even if bad to cut out, it is quite cheap, he would think so from his experience and knowledge; is not familiar with the timber in Sections 5 and 6 which were in the first fire; when he spoke of sixty cents, per thousand, or \$1.50 per thousand, he did not take in very much country, that is around the vicinity of Hoover's mill, which is the same place as Hoover Postoffice; he is not particularly familiar with the lay of the country below there, he just passed by the water-tank, passing along on the train and fishing along the river there, that is all; did not know the price paid in that locality, not that far down, from 1900 to 1906, but does know around Detroit, or down at Berry.

Cross-examination.

Would hardly know what would constitute second-class timber, but he would put this timber into lumber, and it brings a good price, railroad ties; he would not know how you would get two classes of this timber, unless it was badly burned up, or something like that; take green hemlock, he does not see how one could get two grades, that is, two classes, until it was manufactured, then you could; has not bought or sold very much hemlock, wasn't cutting much when he

(Testimony of W. A. Hoover.)

was up there; hemlock does not grow as high as fir; does not know what the market value of timber was from Berry, or as far as Berry, by the quarter section, but did from Detroit up above Hoover, where they take the whole quarter section at least; some of the timber up around Hoover is generally tolerably level land and easily logged, and some is not, some is bunched, and some, when he bought a piece up there, had a burn in it, burned along about 1892, but they didn't consider that at all, they left that; the value is fixed according to the quarter section of timber, where it is pretty well bunched together, and would run about so many thousand feet to the quarter section, where it could be easily logged, easily got at; it makes quite a difference with reference to the timber as to whether it is together so that you can log it and run it to a logging camp; makes some difference also as to the number of million feet upon a quarter section or given area which one is buying, as to what he will pay for it; if a quarter section had only one million feet scattered all over the section, it would not be worth very much, without there was something adjoining that was good, he would not consider it at all, just a small piece that way, it would be good stuff if it was alive and growing all right, but burned it would be different; if he were buying, say a quarter section, or forty acres, of standing timber, he would want it pretty close to something else, or he would not want it at all; if he was buying a quarter section that had two million feet of timber on it, he would give as much for that, proportion-

(Testimony of W. A. Hoover.)

ately, as he would for fifteen million feet, if they were right together; if it was scattered all over the quarter section, he would care to buy it if he got his lines out and engines, he could reach out and get it, it might cost a little more, but if they are prepared for it and ready, it could be logged easily.

Whereupon upon redirect examination said witness further testified that they generally buy timber nothing less than a quarter section, sometimes an eighty or a hundred; if he were buying a quarter that had thirty or forty acres burned out of it, he would be apt to make a deduction for that burn, is sure he would; if there was a forty burned out and it was good, when it was green, it would make a difference of one-fourth anyway; the value of timber on west from Berry one and a half miles or two miles is good out along next to the railroad; one gets into bottom land there at Berry, of course there is something easily handled, but assuming that is not burned over, on the ridge, and is as good sound timber, its market value as compared with the timber at Berry would be just as good as some he logged at Berry, and worth the same amount.

Whereupon upon recross-examination said witness further testified as follows:

They have logged over the timber at Berry, and what he referred to was the timber that later on was burned at the time of the fire, and has been logged off since, it is level ground; did not have in mind the timber way up on the side of the mountain there, and away from the railroad track, didn't consider

(Testimony of W. A. Hoover.)

that at all when he fixed its value at \$1.50 per acre; the piece down there was easily logged, and brought more money; as a matter of fact he never bought or sold any timbered land west of Detroit; can name a sale of timber land that was made during 1906, per thousand feet, board measure, at Berry, down on the flat; it ran up the hill some, but he does not know how many million feet on any one claim at that point, it was before the timber was sold, it was in 1901-2, he would think somewhere along there, three or four years before the fire.

Whereupon on redirect examination said witness further testified that timber had gotten dearer after 1902, up to 1906.

**[Testimony of H. G. Hayes, for Plaintiff
(Recalled).]**

Whereupon the plaintiff, to further support the issues in its behalf, recalled H. G. HAYES, who having been duly sworn, further testified as follows:

Knows what he could have sold timber for up at Berry and Detroit, in 1906, about that time, and thinks he sold some claims; there were no mills in operation from Detroit down to his west boundary, but they logged the timber out some and hauled out there to Mill City, to the Curtis Lumber Company mill; the Curtis Lumber Company had bought their timber years before, most of that they were logging at that time; does not know that they had bought any claims in that vicinity since he was there, or while he was up there; there was other timber sold in there, and he thinks he can give the price; the

(Testimony of H. G. Hayes.)

Curtis Lumber Company bought some land in there; conditions have a great deal to do with the timber up there; it is generally sold in 160 acre tracts, but the claims that he is familiar with, that the Curtis people bought, they paid better than \$1.00 per thousand for fir on those claims, and they are beyond the end of the railroad, east of the end of the railroad, and on the opposite side of the river, further away; the railroad had to be extended to reach this timber of theirs; they bought while he was in there, that was in 1906, he thinks, that they bought that timber; it is possibly a mile and a half south and east of Hoover's mill; there were sales occurring in that country in the vicinity of these burns in 1906, he sold some Government dead and down timber, but there was no green that he *know* of; most of that country had been bought up, tied up; knows of one man that wanted to buy timber that burned there, and told him he would give \$1.50 per thousand for it; this was before it was burned; that man is operating in there now, Mr. S. V. Hall; don't know where he is getting the timber, or who he buys it of; this was in 1906, less than six months before the fire occurred; Mr. Hall is a lumberman, his mill is down below Mill City; he buys timber and freights it out; that is what he wanted to do with this lumber he wanted to buy; does not know of Hall buying any other timber, there was no timber sold in there outside of the Forest Reserve, in that locality, except possibly some timber on the south side of the river the Curtis Lumber Company had not yet obtained,

(Testimony of H. G. Hayes.)

possibly two or three claims in the Forest Reserve; they were not sold around there or shortly afterwards; these Whitmans that were in there were trying to sell their timber south of the river at this time, at the time the fire came in; price of timber depends upon the locality in several different respects; for instance, if the Curtis Lumber Company goes in and buys up the timber on a long tract, the man back of them is compelled to take less for the timber, which was the condition; they had logged off all along, that put the man back of them in rather a handicapped position, and that was the case, generally speaking, on the north as well as the south side, but it would not be the case as to Sections 7, 8 and 17, where it extended to the track.

Whereupon upon cross-examination said witness further testified:

The Curtis Lumber Company bought three claims he was very familiar with; he could tell if he was given a blue-print, he could give the claims; had been out four years, and had forgotten a good many of these claims; that was in 10-6; there is no big flat above Hoover's Mill; it is on the south side of the river, and on the side of the mountains, slopes to the river; this timber that they bought, that he spoke of, doesn't touch the river; it is a portion of the northeast quarter of section 20, in 10-6, the Maier-Kriesel, they had some claims in there, but the Curtis Lumber Company had bought three claims; there is the Carlton claim, adjoining one of those that it owned,

(Testimony of H. G. Hayes.)

and he thinks the Coffman claim; he thinks Coffman, Kreisel and Maier are the three they bought this time he speaks of; knows what other persons were trying to buy it at, and they paid more, the Curtis Lumber Company paid more, Mr. Robert Shaw told him so; they have other claims right here adjoining that; there was another claim sold between Hoover's Mill and Detroit, at the same time; the Hoover Company bought—a Mr. Hansen; that cost them over \$1.00 a thousand; he thinks Mr. Hoover remembers that Mr. Robert Shaw of Curtis Lumber Company cruised that claim, and the Hoover Company paid more.

Whereupon upon redirect examination said witness testified that he could not say how much more than \$1.00 Hoover paid for that land, but Hoover remarked to him it cost him over that; it lies both sides of the track; this Hoover was a brother of the witness by that name, there are three Hoovers; does not know how much more than a dollar the Curtis people paid for the three claims down there; the only thing he could do, he would have to find out again what they paid for it exactly, and find his cruise of these claims; he cruised 92 different claims in that locality, and of course by looking up these estimates and getting Mr. Shaw's figures again, he could tell what they paid per thousand, but he knows it would figure more than a dollar.

Whereupon upon recross-examination said witness testified that he was professional cruiser of the Curtis Lumber Company, and he thinks he cruised these claims they bought.

(Testimony of C. D. Matheny.)

Whereupon on redirect examination said witness testified that he was there shortly after the August 11th fire, and he thinks it was about August 21st or 22d.

**[Testimony of C. D. Matheny, for Plaintiff
(Recalled).]**

Whereupon the plaintiff, to further support the issues in its behalf, recalled C. D. MATHENY, who having duly sworn testified on direct examination as follows:

He remembers the fire of August 11th, and that it extended over some territory south of the railroad track and south of the river; was never across it clear to the extreme south side of it, but looking at it from the railroad track along there it looks like probably a couple of sections anyway, south of the railroad track, and east and west, south of the track probably a mile and a half; it began down at the mouth of Blow-Out Creek at the old Spaulding place, that is above the McRae place, below Berry about a mile, probably three-quarters to where the fire started, at the lower extremity, then it went east probably a mile, and south of the river between a mile and a mile and a half, and past Berry and further east probably a mile and a half; about three-quarters of a mile west and probably a mile and a quarter or a mile and a half east of Berry.

Whereupon on cross-examination said witness further testified that he thinks that fire was about three-quarters of a mile west of Berry, down the river, that was as far west as the fire extended.

(Testimony of Charles B. Merrick.)

Whereupon the plaintiff, to further support the issues in its behalf, offered and there was admitted in evidence without objection, the Articles of Incorporation of Willamette Valley & Coast Railroad Company, the predecessor in interest of the defendant.

[Testimony of Charles B. Merrick, for Plaintiff (Recalled).]

Whereupon the plaintiff, to further support the issues in its behalf, recalled CHARLES B. MERRICK, who having been duly sworn, testified on direct examination as follows:

Looking at the plat-book handed to him, at township 10-5 east, the following notation is made: "Received from United States Surveyor General of Oregon, May 17, 1893, and after due notice filed in Oregon City Land Office on this the 11th day of July, 1893, at nine o'clock A. M. J. Apperson, Register." Looking at township 10-4 east, it reads: "Received from U. S. Surveyor General of Oregon, May 11th, 1893, and after due notice filed in the Oregon City Land Office on this, the 3d day of July, 1893, at nine o'clock A. M. J. T. Apperson, Register." This is the plat-book, and this township plat is the plat which comes from the Surveyor General's office showing surveys of public land and other matters within that township, and that is forwarded when his work is completed, to the local land office within the district in which the lands are situated, and in this instance, the Oregon City Land district; these figures that he reads are the dates when received from the Surveyor General, and when filed with the Register;

(Testimony of Charles B. Merrick.)

there have been no plats filed since he has been in office, and this is the only official plat of which he has any recollection, he would not know whether it was the first or not, it is the last one, and the only one they used, he does not know of any other prior to that, and would have no way of knowing; they are usually all put in the same book, same plat-book, sometimes several maps of a town, and they use the latest.

Whereupon the following colloquy between counsel occurred:

Mr. FENTON.—I understand, but here are a lot of claims on this land in legal subdivisions. Now, the date of that patent, survey and filing, in the local land office is in 1883; that would indicate that before that time all these lands were public lands and not surveyed, unless there was a previous township plat.

Mr. McCOURT.—That is the fact.

Mr. FENTON.—That is what I am trying to get at. Have you looked to see whether there is not an old township plat indicating the lands were surveyed prior to 1893, in that territory?

Mr. McCOURT.—It was all unsurveyed land at that time.

Mr. FENTON.—I don't know. It seems to me it was settled before that time.

Mr. McCOURT.—May have been people living there.

Mr. FENTON.—May have been settling on unsurveyed lands. Probably that is the case.

(Testimony of Charles B. Merrick.)

Whereupon said witness further testified, looking at his tract-book for township 10 south, range 5, at the west half of the northeast quarter and east half of the northeast quarter of section 20—there was a filing made on there, the date does not appear on the tract-book, and the date of filing does not appear.

Mr. WEATHERFORD.—What claim is that?

Mr. McCOURT.—McRae claim.

Whereupon said witness further testified that they have a homestead register-book for that, to show the time the filing was made, he has the number of the entry, it is 12,490, and the date of patent issued upon that claim was August 8, 1901, date of proof March 26, 1901, and that covered those two subdivisions mentioned, that was a homestead entry; cannot say from the tract-book whether that was a commuted homestead or full time, but could tell from the homestead register; the northeast quarter of the southeast quarter of section 1 was selected April 4, 1896, as school land—school indemnity; the southeast of the southeast, the northwest of the southeast and the southwest of the southeast was entered by Rosabelle F. Hall, homestead entry 10,683; patent was issued to Rosabelle F. Hall, February 13, 1896, proof being made November 28, 1894; has not got the date of the entry in that case; the northeast of the southeast—forty acres—was selected as school land, indemnity school land selection; it does not show in the plat or tracts the date of the entry, or the date of the filing.

Whereupon upon cross-examination said witness further testified that original papers belonging to

those filings are in the General Land Office, no copies are kept in the office here; proof, application, and everything relating to the claim excepting the tract-book and the homestead register entry are in Washington, D. C.

**[Testimony of James Taylor, for Plaintiff
(Recalled).]**

Whereupon plaintiff, to further support the issues in its behalf, recalled JAMES TAYLOR, who having been sworn testified on direct examination as follows:

He had some experience in the woods, ten—have been in the woods all his life, ever since he was big enough to work in the woods, part in Michigan, and part in Oregon; have been employed by the Curtis Lumber Company ten years, most of the time as engineer, altogether in logging operation; is familiar with the burned district referred to, and in his capacity as a logging man, as a woodsman, have had occasion to work in and about timber that had been killed in a fire; a fire has an effect of 25 to 100% upon the value of timber right after the burn, and it takes about five years to make it a total loss; sap rot renders the reduction of value and volume as small as 25% after the fire, sap rot produces it altogether; if one can log it right after it was burned, the value isn't over 25%—not less, to reduce it that low; at that time the Curtis Lumber Company and the Hoover Lumber Company were the only companies that were working in there, and he knew that the Curtis Lumber Company had areas of timber lands that were killed, but not in the first fire; in the sec-

(Testimony of James Taylor.)

and fire there were several, but he does not know how much, and could not say as to how much of their timber was burned, but there was quite a considerable; could not say what they were paying, but he knew what the value of timber was in that locality, standing timber, before and after this fire, he did not have anything in the deals—transfers, himself; his company figured as the market value, from a dollar to a dollar and a half, according to location of the timber, that is what they allowed for stumpage and logging; he is familiar with these localities.

Whereupon counsel for plaintiff asked said witness the following question:

Q. What was, in sections 7, 8 and 17 here, in township 10-5 south, what was the value of timber—merchantable timber—timber such as you use in logging?

Whereupon counsel for defendant objected to same upon the ground that witness is a logging engineer, who knows that his company was fixing a price depending on the locality, but witness never handled any of the transactions, and his evidence is therefore incompetent; which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

A. I should say about a dollar.

Whereupon said witness further testified upon the same subject, that on the southeast quarter of the northeast quarter, and the northeast quarter—southeast quarter of section 17, the market value he thinks

(Testimony of James Taylor.)

was a dollar; had never been over the southeast quarter of the southeast quarter of section 17, not to look at any timber there, only what he could see from the railroad track; he knows it is pretty rough in there, the principal part of the ground, but does not know the description of the places so as to know right where these descriptions are—have never had but very little to do on the south side of the river; he would say it would not run any less than one dollar there; he would not know as to the value of timber in sections 5 and 6, T. 10 S. R. 5, that is, he would not know it from a logging condition, for he has never looked it over, could not say whether it was less than a dollar or not.

Whereupon upon cross-examination said witness further testified that he never bought or sold any claims for the Curtis Lumber Company, and did not have access to their books, only part, where he was working at the camp; don't know what they paid, or bought the lands at, and that really is all the source of information that he had, in that country; Robert F. Shaw, president of the company, told him something about it; Robert F. Shaw is General Manager, not the president; he became such about two or three years ago, but he is not sure as to this, something like that, could not say just when; he is not sure that he is general manager yet, but thinks he is general manager of the mill, that is the information he has, at least; don't get as good lumber from timber that was burned; could not tell if it goes into the market at the same figure and price, doesn't know;

(Testimony of James Taylor.)

it was four or five years ago that it was burned over, and it is not true that the general business is being run with that class of timber; does not know anything about that section, he is not at that camp, he is working off the Corvallis & Eastern road, and it is not exactly true that all he knows about their business is what was little occurred the camp when he was engineer for them, he has learned a little since he left the engineering business; has been foreman for about a year and a half, in camp; does a little more than taking the logs to the railroad for shipping, directing that, but is not an expert in regard to timber being damaged by fire, never made it a life study, or anything like that; what little he knows about it is not confined to what he saw there in the camp where he had been at work; he was not born there by any means; he was in the woods before he ever went to that camp; he has worked in burned timber, logged some there where he was last summer, it had been burned in that fire in 1906, he logged it last summer and sent it to the mills, to the Curtis Lumber Company; the Albany Mill Company were buying timber in that neighborhood, from the Hall outfit; he believes that company has been operating up there for about two years, one and a half, possibly two years; does not know if the Corvallis mills are buying timber up there, or hauling the same to the Santiam River; believes the Hall Brothers bought some timber from the Government, could not say when it was purchased; they purchased the timber and it run along some time before they started to log; they are

(Testimony of James Taylor.)

logging now, and have been for a year or two; Hall Brothers are just simply loggers, they are buying and selling timber; does not know anything about the Gootch Mill, but believes they are operating there, have seen their mill when passing on the railroad; does not think there are one or two other mills along there; one little mill clear down in the valley that Smith runs, a little tie mill; the Smith mill is called the Smith mill, don't know whether it belongs to Gootch or Smith; he supposed those mills were out of his jurisdiction in that timber belt, altogether—is the reason he didn't mention it; there are mills at Salem or at Santiam, could not say if logs go to Salem; could not tell anything about the Spaulding Lumber Company's business, or whether they buy logs and bring them down as far as Oregon City, Salem, Independence, and Newberg, they used to log up there in that country, but they are not shipping out of there now that he knows of, they have not been shipping from that part; does not know that the paper-mill company at Oregon City buys logs up the Santiam.

Whereupon upon redirect examination said witness further testified that Hall bought from the Government timber on what is known as the Allen place, believes it is in section 18, but would not say positively as to the place; does not know what he paid the Government for it; thinks it was after the fire, but don't know what date he bought the timber; he understood that he had bought timber from the Government, and then it was reported that he had not

(Testimony of James Taylor.)

bought timber from the Government, finally he went to logging there, so he guessed he did buy it; could not give the dates, shape, or form as to when he bought it; in his business as a logger, his association is entirely with timbermen, that is, largely men that deal in timber and handle timber; he hears more or less discussion as to values; there is no disadvantage in logging burned timber; there is no difference as to expensiveness, just the same.

Whereupon upon recross-examination said witness further testified as follows:

It does not matter much to them, with engines, to log-burned land, in so far as the underbrush being burned down or cleared away; if they were working with horses it would make some difference in that way, but with engines very little difference, because the brush does not bother very long anyway, if it is anything but chunks, and they generally don't burn out of the way anyway; have to snipe just the same whether brush was or was not there; brush would not be in the way more or less, and they would not have to cut it out of the way; they do not make any roads.

[Testimony of Dr. E. A. Lawbaugh, for Plaintiff.]

Whereupon the plaintiff, to further support the issues in its behalf, called Dr. E. A. LAWBAUGH, who being first duly sworn, testified on direct examination as follows:

Lives at Meriden, Connecticut; lived in Portland off and on, for between nine and ten years; deals in timber lands, and valuation of properties for bond companies; have had experience in timber land trans-

(Testimony of Dr. E. A. Lawbaugh.)

actions since he has been on the coast a little more than nine years; the first thing they do in these timber land transactions is to do a certain amount of brokerage business; it is a very small part of their business; the bulk of it is the valuation of operated properties for the loaning of money; they estimate the amount of timber on the lands, and take into consideration the availability and the general market, and get at some conservative value; they operate all over the country, Mexico, British Canada, Cuba; have an office in the Oregonian Building, Portland, Oregon; first place he went to in Oregon is what is known as the Santiam Canyon; was there a little over three or four weeks, around Detroit; he has had experience in dealing with timber that had been gone through by fire, partially or wholly, but not in an operative way, but in connection with fire that passed through here seven or eight years ago, over in Washington; he has estimated and placed values upon timber, both for operators and investors; did not personally handle any holdings in the Santiam canyon, but as representing the Charles A. Street Lumber Company; does not remember how many acres he owned or controlled in there for them; he tried to look up his records this morning, but could not find it; figured out four or five thousand acres, somewhere in that neighborhood; from his experience with burned timber, he cannot give any general statement that will cover all cases as to what result a burn which kills timber has upon the value of same from the standpoint of the volume of merchantable timber

(Testimony of Dr. E. A. Lawbaugh.)

left and the value of the timber in its burned condition; has been unfortunate enough to be a victim of an operation, but not in burned timber; has had occasion to go through the books and things that have been operating in burned timber, and ascertained the cost of reduction, not in Oregon; in Washington, and practically the same kind of land, in a general way; he has gone through bankrupt concerns that have made a failure of it, but it wasn't altogether due to burned timber; that was merely one of the cases, but he has had occasion to go through books of concerns endeavoring to ascertain the cost of production, in fact that was a part of his business, to ascertain the cost of production of lumber, cost of operating, and so on—cost of logging, could not answer by any general statement as to what percentage of loss there is on account of such a burn in the value from the standpoint of volume and the ability to use the timber within a reasonable period after it is burned; in a ripe old growth of yellow fir the loss is not as great as in sapling fir; there is some yellow fir; woodsmen differ as to yellow and red fir, he knows the timber in the Santiam canyon is yellow fir, and his woodman calls it that; that is an open question upon which woodspeople differ from botanists, as to the difference between yellow and red fir; it is question for discussion; there are trees in there—the difference between red fir and yellow fir in which they as woodmen classify according to the material you get out of it, that is the way one can put his values on; now, in ripe yellow fir the loss is not as great as it is in

(Testimony of Dr. E. A. Lawbaugh.)

young yellow fir; not so great in ripe fir as in young yellow fir or young red fir; it is a question as to the amount of sap there is upon the tree; when timber is fire killed this sap rots off; there is also another question to be considered in the loss of fire killed timber, that is, the breakage, which results in operation; more breakage in operating fire killed timber than in green timber; also cost of operation from wage standpoint; his observation has been in going through the books of concerns operating on fire killed timber that the wages are from five to ten per cent higher for the same class of labor; men do not like to work in the dirty black timber; it varies whether operating upon freshly burned timber or whether it has been burned for a number of years; if you let it go for three or four years you might as well let it go four or five years more, as far as material loss in that time goes; large loss the first season, not so much the second season after the fire; loss is relatively small per annum; he questions whether the loss is as great as the increase of value of the stumpage ensuing; the actual loss in volume—not very much difference between a green timber and a fire killed timber, as it goes from the tail of the mill, that is, the lumber as it comes out at the end of the mill for manufacturing, the value is equal; one can put a fire killed board from fire killed timber and from green timber alongside and the best of lumbermen will have difficulty in distinguishing; some classes of timber there is some difference, and loss in volume would vary; have occasion to check over

(Testimony of Dr. E. A. Lawbaugh.)

twice the estimates that were made just before the fire and just afterwards, and estimated the loss in volume at between twenty and thirty per cent, which is as near as you can figure it; this work was done within the first year, have not had occasion to go over any in the second year, merely a general observation he has had; he would think the general loss would run anywhere from twenty-five to forty per cent—forty per cent to include a fair amount of breakage; that would be the total loss from the loss of sap and so on, and would extend over a period of say ten years after the fire; one must always remember the condition in fire killed timber; you lose a tree once in a while through pitch seams and so on; whole tree would be gone, which practically you could not use; tendency of recurrent fires is a factor to be considered; after timber is once killed and fire goes through a couple of years afterwards, the chances of practically total destruction is increased; fire-killed timber is open to recurrent fires easily—more frequent than green timber; has seen in one case particularly, they had charge of the property over in Washington, which they bought about nine years ago; fire came along and burned timber on the north side of the creek, and made little indentations and little whirls into the south side of the creek; fires have recurred in there for years, and have often crossed the creek on several occasions; he had men in there watching the fire, but it has crossed the creek to it, has got into the burned timber and never had gone into the green timber at all; the green timber is

(Testimony of Dr. E. A. Lawbaugh.)

somewhat of a barrier to recurring fires; do not misunderstand him that it is a total barrier; as far as additional expense in logging, that is a small matter that does not cut much figure; it is a feature to be considered, but very small; they do not reduce or have any alteration in their estimates, have only one estimate in their work, and aim to estimate what a man with fair logging will get off the land; make no allowance for breakage, but make footnote in work as to what they estimate the breakage at; it varies in various localities; no hard-and-fast rule you can stick to; there is no loss from the loss of sap, that comes from the loss that you get from the green timber; would say a third over what there would be if the timber was green there, possibly forty per cent.

Whereupon counsel for plaintiff asked said witness the following question:

Q. Now, then, from the investor's standpoint, such men as live in the east and come here for investment and are buying through you, to hold for the rise in value?

To which counsel for defendant objected as purely speculative and as not sufficiently close to determine the market value of this timber in this case.

COURT.—He wants to show how much less valuable this land would be after the fire than before. Is that your purpose? I mean, how much less of timber the land will still have after the fire than before, if you wanted to buy it for speculative purposes. I think you can make the inquiry.

Whereupon said objection was overruled, to which

(Testimony of Dr. E. A. Lawbaugh.)

ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

A. That again varies as to the amount or percentage of fire-killed timber to the green timber. The danger of recurrent fires. I would consider the loss of value even greater. I would consider it as high as fifty per cent, depending upon the percentage of burned area and the green area. In this particular locality I consider the danger even greater from a speculative standpoint on account of the proximity of the railroad; not only due to the fact that the railroad is there, but to the fact that it is a traveled highway—people passing up and down there all the time. If it was off in an isolated place, in a cul-de-sac, where people were not going by, it would be of better value than to be near a traveled highway. Another thing, they are operating in there constantly in that vicinity. The danger of recurrent fires over the logged-over lands, of course, everybody can see that they are greater.

Q. That for the same reason that a burned area is subject to fire?

A. Yes. Another thing is the topography of the country always has to be taken into consideration. There are a great many things that one has to consider, and each case has to be taken by itself.

Whereupon said witness further testified that he knows what they sold some land to the Curtis Lumber Company for, in that locality, in July and August, 1906, but he does not know what they generally paid, or what timber generally went at in that locality;

(Testimony of Dr. E. A. Lawbaugh.)

there was not a great deal of other timber there except on Boulder Creek, in those two particular townships that are before him; there was very little that was not owned by the Curtis Lumber Company or the Charles A. Street Lumber Company.

Whereupon upon cross-examination said witness testified as follows:

That the burned timber in that locality, with a railroad conveniently near, where the logs could be marketed or shipped, would have a better opportunity to get to the market than if it were situated in a cul-de-sac, away from transportation lines, but would depend a good deal upon the policy of the railroad, not only the rate, but the opportunity of securing cars; the very fact of the railroad being there would naturally be a better opportunity for immediate realization from this burned timber than if way off somewhere, if there were mills down below, or customers, all the way from Independence up to the Curtis Lumber Company mill at Mill City, logs were being sold to different people that were logging in that territory; if other people could ship at a profit then the people who owned that timber could do the same thing, from the mere fact of the railroad, but from that alone; does not know whether the nearness of the railroad from the standpoint of an immediate market, with the location of that timber within a half mile or less of that line and of that stream, would give an opportunity for sale and it would not necessarily depend upon whether there

(Testimony of Dr. E. A. Lawbaugh.)

were any buyers, the fact of the railroad being in the district does not necessarily result that people can operate there to advantage, but if they do operate to advantage and the railroad is used, there would be a market of some kind at that point, and the market of standing timber or the stumpage would be controlled largely so far as immediate realization is concerned, upon transportation; there are men who will invest right on the stumpage, right in available localities; they are buying land in the Siletz country, where there are no railroads, but that is offset by the actual quality of the timber, large quantity, cheapness of product when that country is opened up; not quite as much can be realized from burned timber if all that has happened to the forest tree is that the bark is charred and it is a crown fire which has killed the green limbs, the foliage, and the tree itself is just as sound as before the fire, that tree could be logged and made into the lumber within the next season, just as well as if it had not been burned, but not quite as much realized; thinks deterioration would sometimes take place in six months; if the fire occurred in July and August, there would be a stain in the sap if they could not get it logged off that winter; sometimes the starting of a rotting; there are sections in this country where sound trees have been logged that have been down for 25 years, they are sound to the extent that the sap is gone, very often it is as high as six inches, the average would be two to four inches; a small tree has more sap in proportion to volume than a large one; a tree 22 inches in thick-

(Testimony of Dr. E. A. Lawbaugh.)

ness in one locality would be one inch, in other localities four inches; he has made no test of sap in this locality; the average would be from two to four inches; after from three to five years the sap value would be destroyed, and the sap is no longer *is* merchantable value, but you cannot make any definite rule on that; practically after the second year that portion of the tree affected by the sap would be a total loss, and after that it might stand ten years without any increase of loss; has had some records of 17 years after a fire; there are other conditions too as to it being sound and merchantable with the exception of the sap part of it; storms will break off the top, and you get what is called top rot, you lose a top log, and it begins to rot down in, where it has died, it breaks, becomes brittle; there should be a percentage of breakage figured in green timber, where these big trees are 75 feet high, they always estimate the amount of timber there is on the ground, then they estimate the amount of breakage and include that in their report, in figuring for the investor; the percentage in green timber varies anywhere from five to fifteen per cent; the percentage of breakage in burned timber, provided it is logged within a period of three years afterward, would be anywhere from 10 to 25 per cent, he would not figure that there would be very much of an increase depending upon the height of the timber, the location, and the logging; in breakage during the first two or three years there might be a little variance.

(Testimony of Dr. E. A. Lawbaugh.)

Whereupon upon redirect examination said witness further testified that trees that are down and being logged, are not always cedar trees, mentioned there, some are fir trees, and they have been down for ten years, these fir trees, and they have not rotted to the inside; had seen *fir* especially in what you might call the Coast Range, where they are down for longer than that, where they get good logs; there is a large amount of waste, but one gets good logs, a few; usually it is clear lumber, and has a value from that standpoint; there is considerable expense in securing the salvage from these logs, and of course one saves some money that one has in green timber; one may have his fallers and so on, and usually in this down timber it is pretty clear timber; it is not the loss from the dead stuff that has to be disposed of and taken care of, that is taken into consideration in estimating the value of burned timber, very much; he is not familiar from experience with the attitude of this transportation company, as they did not do any operating up there at all, but merely bought this timber as an investment, and disposed of it as such; the fact that the Curtis Lumber Company and the railroad company were under a similar control had some influence upon his disposing of his holdings.

Whereupon upon recross-examination said witness further testified that the timber in the neighborhood of the Santiam canyon, within the limits of the Forest Reserve, from Detroit west, was not all old timber; there is a quality of timber you get there, especially on the coast, that is entirely different from this

(Testimony of Dr. E. A. Lawbaugh.)

timber; the timber in the Santiam canyon was to a great extent all thrifty growing timber, places where it was fairly ripe, but bulk of it—the size cuts no figure, that is no test as to whether a tree is ripe; he has seen in the coast country a tree that is 12 feet in diameter, still a healthy growing tree, then again he has seen a tree 8 feet in diameter, two logs in a tree, that was what he would call ripe tree, it had reached its maximum growth, exactly why and all that, he doesn't know; he is not familiar with the Sardine Mountain country, but would say that there is very little timber in there 22 inches in diameter, it was generally from 36 inches to 60 inches, with a prevailing size of about 4 feet; he wouldn't regard that as practically mature; 22-inch timber he would regard as young timber, it would not be called pole or piling timber; in a 22-inch tree one gets a couple of butt logs out of it, and use the top for a pile; in their work they throw piling into board measure, and leave it to the discretion of the operator as to whether he will get a couple of butt logs and a short pile above, or consider it as a 70 or 80-foot pile; as a general rule, he would regard that timber in that territory as very good timber; it did not cut a large percentage of clear, but it cut a large percentage of merchantable; it was not what you would call immature or relatively young timber; it was a fine class of merchantable timber; that forest goes way up to Boulder Creek, and all through that country there; the prevailing size was four or five feet, especially right around the Breitenbush there; he is more familiar with timber

(Testimony of Dr. E. A. Lawbaugh.)

around Breitenbush and Detroit, and that down below Berry, because he was through the Curtis Lumber Company's camps where they were logging at the time; they take a contingent interest, generally, in property that they buy, as a matter of brokerage; they own some timber, but only in a small way, they are in the way of commissions or compensation for deals that they have put through; they own some pieces around in places, but they cut no figure; his business is not primarily that of a timber broker, about 90% of their business is reporting for bond-houses, or for people who want a conservative report on properties, not so much for buying or loaning or holding, as it is on operations; in the last three years there has developed throughout the country a class of business of bonding operative properties, issuing bonds just the same as railroad bonds, etc., short-lived bonds, from 5 to 13 years is the maximum, that is, to pay the indebtedness they must pay so much per thousand, all based upon their reports—they take their timber off, to take care of the sinking fund and interest; 90% of his business is along this line.

Whereupon on redirect examination said witness further testified that that brings them right up to the prices that are being paid for timber, and actual value and cost of operation; the timber spoken of had not quit growing; he was never in that land or in that country around the water tank, he was more around the Breitenbush, on Boulder Creek, that runs up just north of Hoover's mill there; he does not agree with most people on the matter of growth of

(Testimony of Dr. E. A. Lawbaugh.)

timber from an investor's standpoint; there is some growth; he is not at the point of saying that the growth is equal to the interest charged, and the taxes; he does not think it is now time to realize, but does think there is an increase in value all the time; he bought stumpage in there for ten cents per thousand, the Curtis people bought for less in some places, but there was a reason for that, other people couldn't operate; that was the basic reason; why they couldn't operate is a matter other people are better informed on than he is.

**[Testimony of Charles B. Merrick, for Plaintiff
(Recalled).]**

Whereupon the plaintiff, to further support the issues in its behalf, recalled CHARLES B. MERRICK, who having been duly sworn testified on direct examination as follows:

The entry of John A. McRae, No. 12,490, was made August 25, 1899, commutation proof was made March 26, 1901; the application to *proof* up was filed Feb. 4, 1901, it was a commuted homestead.

Whereupon on cross-examination said witness testified as follows:

He could not tell from any records he had when he made settlement; the township map, he thinks, was filed in 1893, and he made his application to enter or filed his entry August 25, 1899—six years later; the record shows that he made commutation proof in 1901; the filing was August 25, 1899, that is permissible up to 14 months; a settler has sixty days

(Testimony of Charles B. Merrick.)

after the filing of the map or township plat showing surveyed lands, under the rules and regulations of the Department; witness testified this morning it was 60 days after it was filed; he has a memorandum of authority given by the Commissioner of the Land Office on May 31, 1899, to admit the entry of this particular claim, the Spaulding claim, and it means that it was thrown open upon his request, and he testifies to that from the fact that he looked up this particular letter, and it said upon request of John A. McRae, this particular subdivision was thrown open for settlement; it was within a Forest Reserve.

**[Testimony of W. A. Hoover, for Plaintiff
(Recalled).]**

Whereupon the plaintiff, to further support the issues in its behalf, recalled W. A. HOOVER, who having been duly sworn, testified as follows:

The fire of August 11th spread a little less than half a mile south and east of Hoover's mill; he would hardly know how far south of Sower's logging camp, but it burned clear up to the top of the mountains, would hardly know the distance—half a mile or a mile, something like that from the railroad, he does not know what it was.

Whereupon the plaintiff rested its case, and the foregoing, with the exhibits hereinbefore referred to and hereto attached, marked and identified as Plaintiff's Exhibits ———, was all the evidence offered or admitted by the Court upon behalf of plaintiff.

[Recital Re Motion for Nonsuit, etc.]

Whereupon counsel for defendant, at the close of all of said evidence, moved the Court for a judgment of nonsuit upon the ground that there is not sufficient evidence to go to the jury to show that the defendant was negligent, and particularly make this motion upon the ground that there is no evidence to go to the jury upon either count of said complaint, to show negligence of the defendant.

Which motion was overruled, to which ruling the defendant then and there excepted, which exception was allowed.

[Testimony of S. Benson, for Defendant.]

Whereupon the defendant, to support the issues in its behalf, called S. BENSON, who being first duly sworn testified on direct examination as follows:

He resides at Portland, and is a logger and timber owner; commenced the logging business in 1881, in Columbia County; had experience in logging first in Columbia County, next in Wahkiakum County, Washington, and now back in Columbia County, Oregon; his plant is near Clatskanie, and is known as the Benson Logging & Lumber Company; has been engaged in business near Clatskanie, Columbia County, 7 or 8 years; the first ten years—since 1881—his business was very small, and after that it grew quite rapidly and he put in sixty or seventy million feet there a year for quite a while; have logged considerable burned timber, the largest

(Testimony of S. Benson.)

tract was in Cowlitz County, back of Oak Point; he had a section and a half or a thousand acres in one tract; that was in 1893 and 1894; he logged also back of Cathlamet, logged some at what is called his lower camp at Oak Point, he has two camps there, the lower camp was at Oak Point; he would not be able to say just how much, but nearly every year they had some burned timber, fire would go out and burn timber, and when they could get to it they logged it; by burned timber he means timber that has had crown fire sufficient to kill the tree, his experience has been in that character of timber; the damage to trees that are from 36 inches to five or six feet is little or nothing for the first two years, then the sap turns black and the loss is about 10 to 15 per cent up to five years; for the first two years after the fire there is no damage to speak of, and in the third year there is a commencement of discoloration of the sap part of the tree, during the third year practically all the sap turns black so that it is not merchantable, and there would be added during the third and up to five years, in his judgment, from his experience and observation and from his logging in this character of timber, ten to fifteen per cent; he has logged timber that has been burned 21 years, found about 50 per cent loss; his experience has only been in such timber as grows on the Columbia River, in Cowlitz County, Columbia County and Wahkiakum County; he has never been in the Santiam country, but, assuming that the timber in the Santiam country is red fir with some

(Testimony of S. Benson.)

yellow fir, and that the trees were burned over so that the bark was charred and the trees were fire killed, but no tree included in the estimate that was decayed or rotten fir, or pitch, or that was burned into the body, only such trees as were sound with the exception of the bark being burned and crown fire killing the limbs, he would say, from his experience in the logging and marketing of sawlogs from such burned timber that there would be no damage for the first two years after the fire; he has supplied, in his experience with logs from his logging camps, including logs from burned timber, the Portland market; his business in the past ten years has been 7 or 8 hundred million feet all told; he thinks his firm has been the largest single logging concern in this section of the country during that time; is not acquainted with the market value of stumpage in the Santiam country, but quality, location and transportation facilities are the elements which enter into market value of stumpage of fir timber for logging purposes in this state, or section; if one had a quarter section of land that only carries approximately two million feet of saw timber, or of merchantable lumber timber, or less than that, the market value of that character of stumpage, where it is scattered over the entire quarter section, would depend on several things, first, whether that laid in between other profitable forest sections or not, if it laid off to one side, it would not be of any value, if it was between other profitable forest sections yet due to log, it would be the same value as the bal-

(Testimony of S. Benson.)

ance; in logging, one first builds his logging road to the center you are to log from, and whether or not a given piece of timber would or would not be more or less valuable for the stumpage upon it, would depend upon the accessibility of that timber to the whole main land; the other elements besides compactness and quantity of timber on the claim or quarter section, which enter into the value of the stumpage—the market value—are quality, location and transportation, they are the main things; if the timber involved in this particular case is situated upon a high mountain or upon the side of that mountain, which is steep, and is more or less scattered, and the only way to reach transportation is down the hillside by such appliances as loggers use, some of that timber upon the high sides of the Cascade Range have absolutely no value at all, it would cost more to get it out than it is worth; in a general way he knows accurately the market value of stumpage, maximum and minimum during the year 1906, or within a year or two thereafter, in this market, the State of Oregon; he bought several thousand acres during that year, and in the ordinary market it could be bought or sold generally for fifty cents to a dollar and a half per thousand; quality, transportation and location controlled maximum and minimum prices; if the timber was remotely situated or was so situated as to be on a steep hillside or mountainside and was scattered, it would decrease the market value of the stumpage materially; he has no knowledge of the market value of timber

(Testimony of S. Benson.)

or stumpage on the Santiam river, he does not know whether any timber or logs are marketed from that Santiam country, down the Willamette River, this way, does not know of any, and don't know how those logs could be brought towards Oregon City, he sells no logs south of Portland, but he can state that the maximum and minimum values of stumpage were from fifty cents to a dollar and a half, from his experience on the Columbia River and its tributaries below Portland; first borer was in 9 or 10 years, they began work in the top of the tree, do very little damage to the logging part of the tree during the first two or three years, in 12 or 13 or 14 years they get down in it far enough to spoil a top log occasionally, in 15 or 16 years you can count on one log spoiled in every tree; from his knowledge and experience as to the difference in percentage of breakage in falling green timber for logging purposes, or in falling timber that has been burned, the first three years there isn't any difference, after that there is a small larger per cent breakage in dry timber; speaking of the difference in cost of logging a burned over tract, assuming that the stand of timber is relatively the same as if it were green, and a green tract, it would be a larger cost in logging burned timber, for the reason you are logging this dead sap for nothing, ten or twenty-five per cent, whatever it might be, is logged for nothing, but before it is damaged any, there would be no difference in the expense of logging a green forest and a forest that has been burned, the burning of the under-

(Testimony of S. Benson.)

brush helps the logging a little; for the first three years there is practically no difference in the expense of logging a green tract or a burned tract, and if anything, it is in favor of the burned tract.

Whereupon upon cross-examination said witness further testified as follows:

Logs that are gotten out of the burned timber are scaled the same as the other; they deduct the sap if that is black; it did not turn black in one season in any of his timber, it was about two seasons before it got black; has logged on both sides of the Columbia River, and in Wahkiakum County and Cowlitz County, Washington, but did no logging for the Weyerhauser people, but knows of them logging burned timber, but nothing about the circumstances; never heard that it cost them more or as much as they got out of it, to log it; there is a difference in the destruction of the sap in different localities, but just how much is hard to say; in some places the coloring of the sap ensues quite soon after the fire, and others it takes some time; the valuation differs in different localities; the maximum or minimum of allowance to be made on burned timber he should say was 20 to 25 per cent, about the average; in purchasing they do not make that allowance in the first year or any other time, he bought timber where he didn't make any allowance because it stood where he could get at it to log it off, he was right there on the ground to log it, if it had been way back he would not have bought it at all; the logger only gets paid for what is good in the log, the sap being black, he does

(Testimony of S. Benson.)

not pay for that; never logged any but his own timber in a burned district, he would charge a man the same price for logging a burned tract as green tract, thinks he would make no difference, he would haul this dead stuff down to the mill and not charge him, because the present way of logging by machinery, you haul that stuff and it doesn't cost you anything to do so; for instance, if you had a log that was 4 feet in diameter, and there was 4 inches of dead stuff all around, and you hauled another log of the same diameter that had no dead stuff on it, you cannot haul one as cheap as the other, but you don't have all of that kind, you get some of that and don't allow anything for it; whenever you make an estimate of a tract, and find a lot of that stuff, you knock it off in the estimate, but has never known of any difference being made for logging, in that locality, wherever you logged burned timber, you logged green timber with it, so the proportion was so small that it was not worth while making anything of it; in logging a large tract of dead timber to which he referred, it was not mixed with live timber, that was 900 all by itself, owned by him, worked it for himself, did not log it for somebody else under contract; could not say that after a fire has gone through timber the trees blow down or break off more readily, when you are cutting them they break very readily; breakage is larger in dry timber than in green; breakage does not appear in pronounced way until three years after the burn occurs; the sap has got to get dry before it makes any difference in the break-

(Testimony of S. Benson.)

age, that takes 3 or 4 years, on the southern slope of the hill it deteriorates faster, but he would not be able to say just what the difference is; if timber is on a hillside right among the other, one-half or three-quarters of a mile above a railroad and river which is navigable for logs, that timber would be more valuable than timber back a ways if the hill and the mountain isn't too steep for operation, the difference wouldn't be worth mentioning; the danger to green timber adjoining burned timber is very small; liability of green timber is less than dead timber; fire does not run in green timber in this country except in big wind, and can burn right up to it unless big winds, and no damage to the green timber from fires, in his experience, it does not run through it; you find these large tracts of burned timber when the fire is carried up to them by a strong wind and carried through them, a strong wind very often happens about the time the fire happens, that is how those big fires take place; they do not of late take place quite frequently, since people have learned how to take care of the fires—take care of the timber, the stronger the wind when the fire goes through, the more intense the fire; the earlier this decay sets in, the harder the timber gets scorched, the quicker it will decay; the borers attack these trees—dead trees, in ten years, in ten years they tackled his, not before that; there is nothing in the way of deterioration or decay except the discoloration of the sap wood on account of the heat, and where the heat has been intense, it attacks that sap

(Testimony of S. Benson.)

wood early after the fire; longer than 3 years might be so long it would be valueless, if it were logged in 3 years it would be worth good money; the relative deduction that should be made would be say 25%.

Whereupon upon redirect examination said witness further testified that he hadn't any reasonable estimate in his mind of approximately the number of million feet of logs he has logged and marketed out of burned timber, but he has logged some every year, in one place about 3,000 acres, just confining himself to that particular tract; he has logged and marketed from burned areas, within his experience, 150,000,-000 from that particular tract, but he has logged three or four times that amount of burned timber, probably six or seven million feet altogether; no difference in the market value between green logs and logs from burned timber, in this market; the depth or thickness of this sap that is talked about is an average of from three-quarters of an inch to an inch and a half, those are the maximum and minimum figures; the minimum on the larger trees would be half an inch to an inch and a half.

Whereupon upon recross-examination said witness testified as follows:

In smaller logs the sap is larger in proportion, and much thicker on small logs than big ones, and greater in proportion to the size; average thickness of sap in log 22 inches in diameter might be an inch, the sap wood in such log he thinks would amount to 30% of the volume of the log, that is a small log, after the log gets above that size the sap gets no

(Testimony of S. Benson.)

thicker and the proportion of sap becomes smaller; have logged more than eight hundred million feet of timber, have logged over a billion, about one-third of that, about 40%, has been dead timber; it was a mistake when he said he had logged six hundred million feet of dead timber, he logged nearly 3,000 acres, and he got it into his head it would go 50,000 to the acre, it was 15,000,000 instead of 150,000,000, that was timber he owned himself, paid full market value for that, he got full market value, the amount of burned timber was small, there was no difference made in the price; he paid \$100,000 for the bunch, there was no difference on account of this little burned timber, although it was quite a tract, with green timber in it; pretty sure he got a lower figure by reason of its presence.

Whereupon upon redirect examination said witness further testified that he had been fairly successful in his business, and had sold one-half of his holdings, has the other half left; he had 46,000 acres in this one tract; began in Columbia County in 1882, began with what he could borrow and get in debt for; he had \$150; has no interest in this controversy, and no relation with any of the parties, didn't know he was to be a witness until he was called this morning.

[Testimony of R. S. Shaw, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called R. S. SHAW, who being duly sworn testified on direct examination as follows:

(Testimony of R. S. Shaw.)

Resides at Mill City, and has lived there about 12 or 13 years; his business is lumbering; engaged in that business probably 6 or 7 years; during the last 5 or 6 years has been out of it; the mill at Mill City is directly under his supervision, and has always belonged to his family for a great many years until sold to the Curtis Lumber Company; he has always been connected in one way or another with this mill, and now holds the position of Manager of the Curtis Lumber Company, at Mill City, and has been occupying that position five or six years; knows where the fire occurred July 23d, and August 11th, or about that time, below Berry, he was present during some of the time it was burning; knows the section of the country over which the fire ran, and is acquainted with the timber in that locality, and has personally been over that country, nearly all the various subdivisions of it, to quite an extent; his company owns timber in the neighborhood of sections 7, 8 and 17, T. 10 S. R. 5 E.; remembers that his company owns the Monkers claim, the Eva McKnight claim, the Ashley claim, the William Bagley claim; his company does not own the McRae claim now; Curtis Lumber Company owns the northwest quarter of section 8; they bought it of Monkers; thinks that is the Monkers claim; could tell better by looking at blue-print; remembers the east half of the east half of 7, and they also had the northwest quarter of the southeast quarter of 7, also the north half of the southwest of 7, as well as the northwest quarter of section 8; does not think they could get

(Testimony of R. S. Shaw.)

to exceed 100 acres of the east half of the east half of section 7, and doesn't believe they will get anything off the northwest quarter of section 8, with the present logging facilities; on account of the steep country, and the rocky bluffs, very difficult lot of land to log; could not say for all of the southwest quarter of section 8; he came down over the northwest corner of the southwest quarter of 8, and that part as steep as getting off of the northwest quarter of 8; but he understands that the northwest quarter of 8 is not so bad when you get up to it, to get to it is practically impossible at this time; yellow fir is the kind of timber in that section of the country, in the southwest quarter of 8, and is of the same quality of fir that is above there; sections 22 and 23 are very rough, they have logged some places up to the line of 23, the north line, to one canyon that he personally went to with his logging superintendent and foreman, and they had to leave on account of breakage and impracticability of logging; left the timber standing; could not log at the present prices; could not log it anyway, because it would break to pieces getting it up, so it was a useless proposition; in the falling of timber down the mountains, it would break all to pieces and pile up so one could not do anything with it; that is what he means by breakage; has had experience in handling timber that has been burned over in that section of the country; he has some timber belonging to the company, of that character, situate in that burned district as shown on the map, in the same district as shown on the

(Testimony of R. S. Shaw.)

map; they commenced logging it directly after the burn, and it has been about four years, and for the first, or about two years, didn't figure any loss to speak of, and after probably in the third year, the sap commences to color, and by the expiration of the third year, they figure on losing the sap; he would say that trees 36 inches in diameter to five feet in diameter would have sap about 1½ inches in thickness; they have manufactured out of burned timber since they have been operating the Curtis Lumber Company, probably 40,000,000 or 50,000,000 feet; there was scarcely any burned in there before the fire of 1906; they have manufactured some that was burned longer back than 1906, at another camp; that was about six or seven years ago; they have logged most of that off in that district now; logged an eighty this last winter that was burned during that fire, the loss was probably 25 to 30 per cent; during the first two years he would not say there was any difference in cost of logging timber that has been burned; in fact, he would call it as cheap as logging the green timber, because there is no loss of sap, and less underbrush to contend with, but after that time while your logging don't cost any more, probably you don't get quite the scale off it, after deterioration sets in, as you would get if it was green timber; there is no difference between the lumber that is made from trees that come off this burned district, and that which comes off an unburned district, they market it the same as green timber, there is no trouble with it; they were buying timber in that

(Testimony of R. S. Shaw.)

locality there at that time; the market value would be a hard thing to state, because the timber that was back was not worth anything like that that was in front, along the track; it would depend upon the location of the claim; could not state just what the real value would be; depends upon the facilities for logging it also, shipping it to market, and the question of being back from the railroad, and other property between you and the particular tract of timber and the railroad, would have some effect, on the price they would pay; they might have a tract of timber back from the railroad and another tract lying in front of them, and by buying the tract in front, they could log the tract back of it cheaper; they would have to get rights of way over the land in front as well, and save any damage to the other man's timber, and trouble with it; it is more expensive to log the farther away from transportation, but the value of the timber depends how rough the country is, rocky bluffs and such as that, and high mountains, why, of course the timber in back at the present time, they consider it almost valueless, as far as they are concerned; he would consider the timber in that locality growing timber, some ripe, most of it growing timber; the market value of timber in that vicinity, in 1906, he doesn't think they paid to exceed fifty cents, he would consider that the market value; has not done much cruising himself, but looked over a good many cruisers, they have cruisers out a good deal; cruisers do not come pretty close together in estimating the amount of timber on a

(Testimony of R. S. Shaw.)

tract of land; he had one-quarter section he had four cruisers on; it ran all the way from 31½ million to 15 million feet; the first cruise was 31½ million; what the two medium cruises were, he won't say positively, but one ran about five and one about eight; the last cruise was 15,000,000 feet; sometimes it is a hard thing to draw conclusions from.

Whereupon on cross-examination said witness testified as follows:

He could not say positively how many acres of timber his company had that was run over by that fire, it ran partly in 23; he was on the northwest corner of 23, and found a burn on the northwest corner of the northwest quarter, south of the river; he would give the description as the west half of the northwest quarter of 22, as the timber he thinks is valueless; there is a backbone runs in there and slopes to both sides, hardly room for a man to walk; difficult to log; section 15 is all logged, that is part of that they didn't get on account of steepness, that is on one draw; they didn't get that; he thinks the southeast quarter of the southeast quarter, either there or close in; the north line of 23—the southwest quarter of the southwest quarter of 14, and they left it there, it was difficult to get that to the river; that timber is standing now, they own it now, they logged what they could, they didn't turn it back to the Government, they own it now; he said southwest quarter of southwest quarter of 14, and didn't say 15; it is only a quarter to the river, and he thinks it would be pretty steep; wouldn't say positively because he was not logging

(Testimony of R. S. Shaw.)

there; was logging on the other claim; went up there to buy that McRae claim, and wrote him that at the present time he would not have it at any price, would not want to pay the taxes on it; the McRae claim is the west half of the northwest quarter of 23, and the east half of the northeast of 22, that is half a mile back, half a mile long; speaking of that, he said all he knew about it was the northwest quarter of the northwest quarter of section 17, he had been over that, and not over there (pointing to map), so could not say; knows that the other was not practicable; not prepared to say as to the southwest quarter of 17; noticed the survey corners when he was traveling up there, found the corner, had his bearings all right, and knew where he was; you leave 20% of green timber on account of breakage, sometimes they leave 20% of green timber on account of breakage, and the per cent of burned timber depends on the lay of the ground; take good ground, very little; that is, logging the first couple of years before the sap begins to deteriorate, even in the first two or three years with the sap—they don't take it all out; don't think they leave any more than they do of green timber; they have been buying very little burned timber claims in that country since 1906, could not say how many; he bought a few himself prior to that time, but most of the buying was done for the company; does not believe he bought any burns in that district, because he don't know there has been any that they cared to take, but he had bought below there some ten miles, burned six or seven years ago; bought two lately,

(Testimony of R. S. Shaw.)

burned six or seven years ago; paid about \$1.00 per thousand; the green timber was worth about the same, but he don't know anyone buying green timber; he bought it because it was near their holdings and their railroad, right by that; they haven't got their cruising estimate in, could not say just what allowance was made in volume on account of the burn, about six or seven years one should make some allowance, but they didn't make 30 or 40 per cent, they paid about as much as they would for green timber on the one they bought, but could not say about the allowance in measurement that would be made; didn't say they had bought any green timber in there, or what they paid for green timber, but said that they bought that claim because their railroad was in near it, and they needed it because they were building a road beside it; did not have a peculiar value to them beside the timber on it, their railroad didn't go through this claim, it was along beside it; they have not been buying any green timber in that district to speak of, they probably would make an allowance between timber that had been burned and green timber similarly situated, they would have to; the green timber in that same locality was not worth to them \$2 at that time, nor \$1.75, nor did they pay that; knows of this claim in southeast quarter of 18, in which the Government has an interest in the northeast quarter being bought by a man by the name of Hall, knew when he bought it, he paid on stumpage basis \$1.75, that was about six months after this fire, and he logged it in with one engine; didn't say all

(Testimony of R. S. Shaw.)

of 17 couldn't be logged, he said the northwest quarter of 8, and the northwest quarter of the southwest quarter of 8 was impracticable to log, but he did not say anything about 17, if he did, he got confused on the map, that is all, it is the northwest quarter of the southwest quarter of 8 that he crossed, did not cross 17, because he looked over the east half of the east half of 7, and the northeast quarter of 8, and then came down across part of the northwest of the southwest quarter of 8; couldn't say offhand where the Al Monkers claim is, they didn't buy it, it might have been bought by the company prior to when he was doing any of the buying, does not know whether it is one of their holdings or not; knows the Hansen claim, but cannot locate it right now, did not buy that personally, and does not know anything about it; did not buy the Myer and Kressler and Carlton claims, they were bought by the company, he doesn't know anything about them directly, or what they paid for them, but did not pay more than a dollar per thousand, couldn't say if they paid that; did not have authority to pay more than a dollar for anything, and very seldom paid it; they were the principal operators in there at that time; does not know anything about the Corvallis & Eastern Railroad, his brother was not vice-president at that time, had no situation with it at all; his father is John W. Shaw; he was secretary; knows that all this Government timber in there has been for sale since the fire; they have made no offer for it, they have plenty of their own; didn't care to pay the Government \$1.75 a thousand

(Testimony of R. S. Shaw.)

for timber, and wouldn't pay them that; could have taken some Government timber if they had sold it reasonable; they took some green timber; they wanted a price they could not log it for; haven't bought any Government timber since 1906, and never did; do not think they are the only people in there that could use that burned timber; the mills at Albany, and at Corvallis, could use it, there is Gooches mill between Lyons and Mill City; Hoover's mill above Detroit; he thinks several would take the timber if they could get it at a reasonable price they could log it off for; the Hoover people are operating mills above them, they did operate at that time, he thinks the other people are shut down; the Albany Lumber Company are taking the timber Hall is getting out; thinks part of timber Hall is getting is burned, he is getting it off that piece that counsel pointed out in 18, but witness does not know location; he does not know positively about whether that is one that wasn't burned, but thinks Hall is shipping a good deal of green timber, although he hasn't paid much attention to Hall's logging camp, because it was out of his line, Hall is not logging for them; Hall ships by railroad; he started to work in connection with the timber up there, with the company, when he took the management of the business, it had been and is under his supervision; some five or six years; he was manager of the company in 1906; prior to that time, five or six years ago, in the mercantile business at Mill City, not connected with the lumber business; connected with a mill like this ever

(Testimony of R. S. Shaw.)

since he was a boy; all that time; the deal on the claims of Myer, Kressler and Carlton was made through another member of their company, believes he signed the vouchers for them, but the price paid, he doesn't know; thinks he has a small map of 10—6; does not remember telling Mr. Hayes, then employed in the Forest Service, on the way from Mill City or Detroit down to Albany, in the winter prior to the time of these fires, that he had purchased these claims and paid more than \$1— therefor, or more than the Hoover people offered, don't think he ever said anything of the kind, he is not in the habit of telling his business to outsiders; it is not a fact that he and Hall were together conversing on the train at the time, he said he paid an average of 50% a thousand, but didn't say it was the maximum price, don't know what the maximum price was, but they never paid to exceed a dollar for anything, didn't have authority to pay that; they might have paid it for some front claims, they turned down a bunch of timber near Niagara at a dollar; don't know what the purchase price of 500 or 1,000 acres that they bought from Charles A. Street was, it was handled through the Portland office; do not particularly do all their buying in Mill City, but he supervised it to some extent, and learns what they are buying; you can't keep all those things in mind, he couldn't give the price they paid at that time, because he doesn't know offhand; he is manager of the company; bought under contract in Portland, saw the contract but never signed same as manager, it was signed by the Secretary of the

(Testimony of R. S. Shaw.)

company, the contract was sent to his office, and is in his office, he has examined it, but he did not have the timber cruised, the timber was cruised through the Portland office, which conducted the cruising of timber down the river and through the State, the cruisers were sent out from there; only the smaller claims, claims that occasionally he wanted cruised in a hurry, he sent out cruisers from near the mill; that large tract was taken from the Portland office, they made their reports to Portland on that, does not remember that they made any duplicates to him; it is a fact that he was manager of the milling plant and was expected to cut the timber; some of that timber that he bought from the Street company was located clear up in section 26, township 9; it is true that he heard that purchasers of the three claims, Kressler, Carlton and Myer, or some of their representatives, offered the timber to Hoover & Company over the telephone at \$1.00 per thousand; his company didn't rush out and buy them by paying a little more.

Whereupon upon redirect examination said witness further testified as follows:

Had not been over section 17, but went in section 8, he came down out of Monkers claim into the northwest quarter of the southwest quarter of section 8, he was mistaken when he said 17, got confused on the map; Curtis Lumber Company is an affiliated concern of the Hammond Lumber Company, with office at Astoria, and principal office at San Francisco; he was manager of the local plant; this company also has office at Portland at this time, con-

(Testimony of R. S. Shaw.)

trolled and operated by Mr. Hammond.

Whereupon upon recross-examination said witness testified that they looked to him for local information, matters concerning the mill up there, and its operations.

[Testimony of T. H. Sherrard, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called T. H. SHERRARD, who being duly sworn, testified on direct examination as follows:

His present position is Supervisor in charge of the Oregon National Forest, and has been for two years; in 1906 was in charge of an office in Washington; has been in the forest service for ten years, in various capacities, first Forest Superintendent, then chief of the office of management, then as inspector, then supervisor; in his experience became familiar with the regulations and instructions issued by the Secretary of the Department of Agriculture from July 1, 1906, down to the present time; Mr. Pinchot was Forester during that time, and James Wilson Secretary of the Department of Agriculture, and he is the present secretary; Mr. Pinchot continued to be Forester until the last sixty days, when his successor was appointed; it is true that under the rules and regulations of the Department of Agriculture, in the execution of the Act creating the Bureau, the United States could sell burned timber within the limits of forest reserved; the Department could make such sale under the Use Book that was in effect under the

(Testimony of T. H. Sherrard.)

promulgation of the Secretary of the Department of Agriculture of July 1, 1906; any intending purchaser can make application for the purchase of timber; practically the same rules were in effect July 1, 1906, as now, and since, under the execution of this Act, the Forest Service was authorized to sell dead timber, which includes timber in burned areas; this is done by maintaining officers at certain points who know about the timber that they want to sell—that the local management wants to sell, then if any intending purchasers inquire about the timber, they are told the prices, etc.; if the amount is more than a hundred dollars in value, it has to be advertised thirty days, and after that they can buy on the area that has been advertised; they advertise a particular area, and have authority to advertise any area within the burned district—in the forest, burned or green, and in the offer or advertisement you can combine green and burned.

Whereupon the witness identified Circular 113, issued by Secretary Wilson and approved by him August 16, 1907, which, for the purpose of identification, is marked Defendant's Exhibit "A."

Whereupon the witness further testified that he thinks he has seen that before, that he recognizes it, and that it appears to be the authorized circular issued by Gifford Pinchot, Forester, and approved by Secretary Wilson, which was in effect from and after its date, and appears to be official.

Whereupon defendant offered said circular in evidence for the purpose of showing that burned tim-

(Testimony of T. H. Sherrard.)

ber, dead timber, has perfect life and strength, and is in the judgment of the United States experts a substantially sound and strong product and is regarded as really of more value than green timber for the purpose of the market; whereupon said Circular 113 so marked, was received in evidence, and is in words and figures as follows, to wit:

Defendant's Exhibit "A" [Copy].

UNITED STATES DEPARTMENT OF AGRICULTURE.

FOREST SERVICE—CIRCULAR 113.

Gifford Pinchot, Forester.

USE OF DEAD TIMBER IN THE NATIONAL FORESTS.

By E. R. Hodson, Forest Assistant.

A study of the amount, location, and quality of fire-killed timber, and of the extent to which it is used, has been made by the Forest Service in a number of the National Forests in the Southern Rocky Mountain region. This brought out very strikingly first, that sound dead timber is valuable, and, second, that though widely used in some localities it is regarded as not worth using in others. The timber which was not being used was found to be fully as good as the other, and the only cause for rejecting it proved to be ignorance of its true value.

DEAD TIMBER.

There are three classes of dead timber: (1) Fire-killed timber, (2) timber killed by insects, and (3)

timber killed by such other causes as drying out or lightning.

Fire-killed timber, which is the best, forms by far the largest part of the dead timber in the National Forests, and is found throughout them. Insect-killed timber, though widely scattered, is usually restricted to small areas. In some localities, however, particularly in the Black Hills, South Dakota, there are many millions of feet of such timber. Dead timber of the third class is mainly met with in single trees or small groups, but the aggregate amount of it is large.

Unless otherwise stated the dead timber hereafter discussed is fire-killed timber.

AMOUNT OF DEAD TIMBER.

The area covered by the study was approximately 13,000,000 acres. On this area there is estimated to be 500,000,000 feet B. M. of merchantable dead timber, or about 4 per cent of the total merchantable stumpage. About 50 per cent of this, especially of the larger dimensions, is fir for saw lumber, and all of it can be utilized in the round. There is also a large amount of cordwood, suitable only for fuel, charcoal, and similar purposes.

CONDITION OF THE DEAD TIMBER.

The principal defect of fire-killed timber is check. This appears soon after the death of the tree, and apparently does not greatly increase later. Timber above 9,000 feet elevation is not affected by decay for many years. Such timber has been used after more than fifty years have elapsed since burning, and

vast quantities of timber killed by fire twenty or thirty years ago are entirely free from decay.

Fire-killed timber should be barked soon after it is killed, in order to prevent decay of the surface. If the bark has been left on, the sap wood is somewhat decayed. Lodgepole pine and Engelmann spruce have about the same durability; after twenty-five years about 50 per cent is usually standing, and the fallen timber, if not flat on the ground, lasts five or six years. Balsam lasts about one-third as long. Standing Douglas fir lasts almost indefinitely, and even when flat on the ground decays but slowly. Yellow pine decays more rapidly, since it occurs mainly below an elevation of 9,000 feet. On the other hand, on account of the openness of its stand, it is rarely killed by fire.

STRENGTH OF FIRE-KILLED TIMBER.

In many places it is the popular opinion that dead timber is very much weaker than seasoned green timber. It is even held that timber which has been dead a number of years is weaker than green timber, and that the longer it stands the weaker it becomes. These views are quite wrong. By actual test it has been shown that sound timber, as a matter of fact, is almost as strong as seasoned green timber and much stronger than green timber before seasoning.

The following table gives the strength of white fir (*Abies concolor*) killed by fire twelve years ago and that of green timber of the same species and from the same locality.

Relative Strength of Green and Dead White Fir.

Number of tests.	Moist- ure.	Fiber street at elas- tic limit	Crush- ing strength.
	Per cent.	Lbs. per sq. in.	Lbs. per sq. in.
Green timber . . 97	47.9	2,370	2,595
Dead timber . . . 58	13.6	4,459	4,824

Seasoning greatly adds to the strength of timber, so that in order to make the comparison a fair one, the green and the dead timber must be brought to the same condition of seasoning. When this is done, the tests indicate that dead white fir is about nine-tenths as strong as green white fir which has been seasoned and about twice as strong as green timber freshly cut.

USES OF DEAD TIMBER.

Since the principal defect of dead timber is check, it has been used largely in the round for mine timbers, coal props, telephone poles, railroad ties, and fence posts. The better grades are also used for dimension stock, which is not seriously affected by the shallow checks found in these grades. It is not much used for inch stuff, however, except as cut-up stock, because of frequent cross checks.

The chief use to which dead timber is now put is for mine timbers. For this purpose it is even better suited than green timber, because it is perfectly seasoned and is light.

It is estimated that the mines of Leadville, Colo., use each month 350,000 feet B. M. of dead timber. There are also many other large mining camps that use it in wholesale quantities. In these camps it is decidedly preferred to green timber.

For fifteen years dead timber has been used for railroad ties in the Pike's Peak National Forest, where it has proved entirely satisfactory. Wherever dead timber is located sufficiently near the track, it is readily sold for ties. Douglas fir, lumber pine, yellow pine, range pine, and, occasionally, Engelmann spruce, are the species used.

In Denver, Colo., dead timber has been used for a number of years for boxes, with excellent results. The species used were mainly Engelmann spruce and lodgepole pine. Limber pine and Douglas fir were also used in small quantities. The first two did very well, especially the spruce, which was used for such exacting packages as cracker and biscuit boxes. Dead timber is eminently suited for making boxes and crates, because it is odorless and is perfectly seasoned. A package made from it does not shrink or warp, but remains as tight as when first made. Since dead timber, when sawed, is largely cut-up stock, it should find a wide use for such purposes.

In smaller quantities dead timber has been used for telephone and telegraph poles, dimension stuff and fence posts. In fact, it has been used for everything for which green timber is used, except thin sawed lumber, and there is no reason why it should not be used for this to a considerable extent also. Narrow widths of the best material, not damaged by checking, could be worked up into flooring and ceiling, and it could be used for second-grade lumber, which would not be seriously affected by a certain amount of checking.

The use of dead timber results in a double economy

—the prevention of waste and a saving of more valuable timber for better uses.

CONCLUSION.

It is past question that sound dead timber, particularly when fire-killed, has decided value and keeps this value for a considerable length of time. Decay does not readily affect it. The strength is not impaired by standing in the dead condition. Some of it is checked, to be sure, but even the best sound green timber is sometimes checked very seriously in seasoning.

Sound dead timber has this especially in its favor; it is perfectly seasoned, and is therefore easily handled and cheap to ship.

Dead timber, moreover, is in an excellent condition for preservative treatment, as the moisture has evaporated from the wood so there is no watery sap to act as a mechanical barrier to the entrance of the preservative. Green or seasoned timber must be piled for several weeks before it is in a proper condition for treatment, or else it has to be subjected to various processes to season it artificially. This artificial seasoning is expensive and is liable to reduce the strength of the timber; therefore sound dead timber is really more valuable for preservative purposes than green is. It also happens that most dead timber in the West has an open, porous structure and can be treated by a simple and inexpensive process without the use of complicated apparatus required by other kinds of wood.

Approved: JAMES WILSON,
Secretary of Agriculture.

Washington, D. C., August 16, 1907."

(Testimony of T. H. Sherrard.)

Whereupon upon cross-examination said witness further testified as follows:

This timber that was burned in this fire of August 11th has been for sale and is for sale, and in an effort to sell the same they have had an officer in charge of the district there at Detroit, whose district includes all that timber that was burned, and he has made every effort to sell timber in his district; have had an offer for the timber adjoining the burned, but no offer on the burned timber; this tract in section 18, which was sold to Hall, was sold after the burn; it was burned only slightly, most of it was green timber, there was some burned timber in it, but very little.

Whereupon said witness upon redirect examination further testified as follows:

The special effort to sell that timber was made before he took charge there, Mr. Wilson was the Supervisor at that time, he is now in Medford; he knows in a general way that there are not many possible purchasers up in that country, for any timber, but does not know why they were unable to get a sale or purchaser for that, when it is along the line or edge of green timber that the Government owns; knows that all the green timber was offered for sale at the same time in order to carry the dead timber; everything belonging to the Government was offered informally to different people, possible purchasers up there, he does not know to whom, what he knows is as reported by Mr. Wilson, but he does not know to whom it was offered, nor the price exactly; thinks they wanted \$1.25 per thousand for the

(Testimony of T. H. Sherrard.)

timber; they got no offer, not able to make any sale there; does not know whether they offered it at any less price or not; in the offer or effort to sell the rest of this timber, in what is called the August 11th fire, he included all of the burned timber; the minimum price he offered to take for all this burned timber included in both fires, with some green timber, was \$1.25 per thousand; he would not say that because he could not get that offer, he made no further effort to sell, because he was not in charge at that time; they have tried to get purchasers for that timber up there at any price, have gone around among possible purchasers, it is because that timber burned there is not of very much value, and not because it is incapable of being logged, or impracticable; he offered to include any amount of green timber with it, and yet could not get an offer; thinks it is because the timber is not worth much now, not because it is impracticable to log it, or because it is not worth anything on account of inability to get to a railroad; there is some good green timber there, adjoining the burned portion, knows some of it would log, thirty or forty thousand to the acre, he thinks; that would be in section 17, 10 —, 5, right in there (pointing on map); this is not the Hall purchase; they have a bid for that one about a week ago, they have been trying all these years to sell that, it covers about half of section 17, thinks it is the north half of the southwest quarter and the south half of the northwest quarter; there is some burned area in the sales they made; in fact he knows there is down timber in there

(Testimony of T. H. Sherrard.)

practically worthless; the application was made by a man by the name of Gooch, they have a sawmill up there between Mill City and Gates, they haven't been there very long, don't know how long; he has a mill down about Lyons, on towards Albany; thinks he is buying this to ship by railroad, to the mill at Lyons, witness thinks, don't know how far that is, perhaps about 25 or 30 miles; not determined what he is to pay per thousand feet board measure, because it has not been advertised; he has applied for it at \$2.00 per thousand, that is, he says he is willing to take it at \$2.00, the whole thing, that includes dead as well as green timber.

Whereupon on recross-examination said witness further testified that that burn includes the south half of the northwest and the north half of the southwest—those two eighties; in view of the fact that there is some burned timber in there, the price is lowered from \$2.50 to \$2.00, that is the way they took up the proposition with him, he says he will pay \$2.00, we are going to advertise to see if we can get more.

Whereupon on redirect examination said witness further testified that the Government puts it at \$2.50; they did not take it up on the basis that he would pay \$2.00 on part of the timber in there, but \$2.00 on all the timber in there.

Whereupon on recross-examination said witness testified that the Government is asking \$2.50 for green timber in that locality.

[Testimony of J. T. Walsh, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called J. T. WALSH, who being first duly sworn, testified on direct examination as follows:

Resides in Albany; superintendent and master mechanic of the Corvallis & Eastern; been connected with that company about sixteen years as master mechanic, and five years as superintendent, and master mechanic, both combined; duty of master mechanic is to look after machinery and cars and locomotives; he has never given up the position of master mechanic; as such he has charge of all the machinery that belongs to the railroad company, such as engines; he is acquainted with the mechanism of the engines that are operated upon the Corvallis and Eastern railroad, and with the mechanism of the smokestack and ash-pans; has a model of the smokestack that was used on the engine that ran to the front in 1906, in July, it is in the courtroom; don't know whether he can explain to the jury here; the model was made by a tinsmith in Albany, under his supervision; it is a correct representation of the smokestack; have had experience off and on for about 45 years as mechanic having to do with the spark-arresting devices of engines; worked for Union Pacific, Southern Pacific out of Utah, before working for Corvallis & Eastern as locomotive engineer; he has had 25 years' experience in keeping engines in repair, since working as locomotive engineer; was with the O. R. & N. as mechanic, at The Dalles and at

(Testimony of J. T. Walsh.)

LaGrande; they inspected and repaired engines at The Dalles, rebuilt them, it was the end of the division between Portland and Umatilla; he was general foreman at The Dalles, foreman of all the machinery, engines and shops; supervised the repairing of ash-pans, spark-arresters, screens and stacks; did not personally put screens on any stacks; with wood burners they had to put the screens on down below in placing the spark-arresting devices, not with coal-burners; didn't do it himself, never did any of it himself, but understood it.

Whereupon the witness, pointing to the model, further testified that this represents the netting that was in this stack in July, 1906, this simply a screen that he has put in there representing; size of actual netting was 8 mesh, No. 17 wire.

Whereupon said model was offered and received in evidence without objection, and marked Defendant's Exhibit "B," which is here referred to and made a part of this Bill of Exceptions.

Whereupon said witness, explaining said model to the jury, further testified that this is the screen; he will first describe inside pipe of the stack: this represents a Diamond stack, it will burn coal or wood either; this is inside pipe here; this is a system of three cones—one cone inside; then this netting comes over this when it is in working order—the locomotive; this is the trap-door, when the engine is standing still, that is ties up for three or four hours; that is to keep the engines from stopping up, giving free

(Testimony of J. T. Walsh.)

draught, otherwise any condensation would stop the netting up, being so fine; the steam and atmosphere would stop the netting up; by keeping this trap-door open it obviates that; it is always closed before they leave the house; the trap-door is closed down before they leave the engines-house, it is positive instructions, they have to do it; this is same netting that goes in where that round piece of wire is in there, that is the catch that holds the trap-door and that pin holds it in place; same netting as on engine in 1906, that is part of real netting in the engine at that time, and the trap-door also; same sized netting as that is that was introduced in evidence; top net made of that also; the air or smoke goes through at the front end of the engine, hasn't an engine there to explain it, but thinks you gentlemen (speaking to jury) know about how an engine is constructed; sits on the front end over the smoke-box and the smoke and cinders pass right through when the engine is exhausting, pass through the pipe, the smoke and cinders break up and pass through the atmosphere, netting is in there simply as protection against fire, that is to prevent sparks from coming out, they will go through this cone first thing, and then netting holds them from going through; of course little cinders will sift through that netting; used fir wood for fuel in July, 1906; that does not fill up so that you have to open that every few miles; there is holes on the inside of the pipe here that they fall through and lead up to the front end by the exhaust.

(Testimony of J. T. Walsh.)

Whereupon said model was offered in evidence and marked Defendant's Exhibit "C," which is referred to and made a part of this Bill of Exceptions.

Whereupon said witness further testified that the kind of pattern that was in use on the smokestack in July and August, 1906, was the same style as here, just a simple smokestack—Diamond smokestack; it is an approved smokestack in use on railroads at that time, good as any he knows of; general use in standard roads.

Whereupon said witness, referring to the model, further testified that this is an ash-pan that was attached to the leg of the firebox, it is right underneath the grate surface—acts as a damper to furnish air for the firebox; that is a model of the ash-pan that was in the engines used on July 23d and after that, in 1906, there may be a little variation in depth—they are generally about ten inches deep—eight or ten inches; general standard form of ash-pan, no approved form; used by all companies, except oil-burners; built on the same plan that model is; those dampers are handled from the engine to regulate the draught; the manufacturer is—they have one Cook, and it was Danforth and Cook, and one Rogers, standard manufacture; screens were No. 16 and 18 wire, 6 mesh, it is the size he adopted for protection; don't know whether railroads use that size; they might use a heavier netting, this is as fine as they would use any place, the meshes are as fine as ever used.

(Testimony of J. T. Walsh.)

Whereupon counsel for defendant offered and there was admitted in evidence, without objection, the ash-pan, which was marked Defendant's Exhibit "D," and is here referred to and made a part of this Bill of Exceptions.

[Testimony of T. W. Younger, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called T. W. YOUNGER, who being first duly sworn testified on direct examination as follows:

Resides at Portland, and is master mechanic and assistant superintendent of the Southern Pacific Company; has held the position of master mechanic for 18 years; before that was assistant master mechanic at Stockton, California; have been engaged in that class of business for 34 years; his life work has been as shopman and engineer; started in and served time as apprenticed machinist, fired an engine, ran an engine, was assistant master mechanic, foreman of the roundhouse, and master mechanic; ran an engine about 4 years, various kinds of engines; used coal mostly where he did his firing or running, and during the time he served as master mechanic in Oregon, the road used wood-burners; he is acquainted with the mechanism of an engine and all of its members; has had about twelve years' experience with wood-burners; looking at the model as it sits there, he would say that it is a very good model of a type of wood-burning and coal-burning stack that was standard with the Southern Pacific Company for a great many years—what they call a

(Testimony of T. W. Younger.)

Diamond stack; the construction is about the same in every respect, so far as he can see; does not think there is any manner of putting up a smokestack that would answer the purpose of furnishing power better than that, so far as protection against fire, he has never seen any in his experience; could not say that that is the kind which is usually used by first-class roads that use fuel from wood; there are many roads use a different type of stack from this, what is called a wood-burning stack, but built on a little different lines from this, in his opinion not as good as this, he considers this the very best type of wood or coal-burning stack that was ever built; in railroad parlance it is called the Diamond stack; the exhausted steam from the cylinders passes up through this (referring to model) and draws the cinders, smoke through the flues of the boiler, and as it goes up this stack it has a whirling action, the cinders, some of them quite large, strike under what they call this cone, back up against there, they circle around in there and come out here; by the time they get through there they are pretty well ground up, and when they strike this netting here—they have to strike on that netting—they have to be very fine before they can go through, if the stack is in good condition; the cinders will fall back probably a number of times before eventually passing through that fine netting; on wood and coal-burners they used No. 8 mesh, same as that, that is, No. 8 diameter, and they use this kind of netting; that is standard and approved for what they call Diamond stacks; some roads use very coarse

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netting; he has seen even coarser than that used on the Northern Pacific engines; thinks they use a netting like that now, but he never has in his experience used a netting as coarse as that in any kind of engine, either wood or coal-burning, would not put a netting like that in any engine for wood or coal-burning purposes; the other netting there is standard, and one used by Southern Pacific Company for a great many years, they don't use a netting now for their engines, they are all oil-burning; so long as they used wood-burning they used that kind of netting; the S. P. Co. used fir wood, same quality of wood used by the Corvallis & Eastern in 1906, and in his opinion that stack is as complete a one as could possibly be made for the purpose for which it was used; that lever, as stated by Mr. Walsh, is what they call a trap, and the idea of having it open at all is to permit of the gas and smoke passing off when the engine is standing at the terminal; this netting being so fine it frequently clogs up or sweats, this trap is put in there to relieve that; their instructions when they run these engines, used these stacks, was to open the trap whenever the engine was tied up; instructions were to keep the traps down at all times until they stop, and then, when they close it, this hook here hooks under this and when the trap is down tight it is secured with this pin in that manner, making a tight joint in this ring here; that is all made tight before they start at the depot grounds, the fireman does that, when they used these stacks they required the fireman to close the trap, they were held responsible for

(Testimony of T. W. Younger.)

closing the trap; the ash-pan is a model similar to what they use in the way of an ash-pan on their coal and wood-burning engines; these are what are called dampers; the netting, if anything, is a little bit finer than they used in their ash-pans; this screen is to prevent cinders from dropping into the pan and rolling out or flying out; if an engine was running, there would be much danger of cinders rolling out on the ground without these nettings; the meaning of that door or trap just closed is the damper for the air—damper on each end, it is bolted up to what they call the mud ring on the bottom of the firebox—the floor, right up against the mud ring, and becomes a part of it, practically; that differs in different types of engines, usually from 8 to 12, 14 inches high from the ground; he is familiar with the engines that ran east from Albany in 1906, on the Corvallis & Eastern, have seen them a great many times, have ridden on these engines at times, on some of them; that is a fair representation of the firebox of these engines, only they are larger, of course, that is a good model of the box they use; the size of the real ones depends on the size of the firebox, those on those engines are about $3\frac{1}{2}$ feet wide by possibly 7 feet long, 6 or 7 feet long, somewhere in that neighborhood, that is a standard box for that class of engines; witness would say that if the box was in the shape that that model is in, there couldn't be any better type of box used, if properly secured to the bottom of the floor—the firebox; the mud ring is the bottom of the firebox, it is the bottom or floor, we

will call it, for illustration; it is the firebox part of the floor; this sits under the grate, the grate is in the bottom of the firebox; the mud ring was a part of the firebox; it is an iron frame.

Whereupon the witness makes drawing on black-board, and further testified that this is the floor, the flues go through there; here is the stack; this is the firebox; a sectional view of that would be like this; this is the mud ring down here; that pan or box bolts on to that; another view would be this; that ~~is~~ the ring, the mud ring; this is inside the firebox, this is outside; water space in here, it is all water there, water on the outside of the fire; by looking at the bottom of the firebox that is the way it looks; this box bolts up against that; damper there; the grates are set crosswise of the firebox; ashes go into the pan here.

Whereupon upon cross-examination said witness further testified as follows:

That that (referring to model) constitutes the entire mechanism of this engine equipment—the stack part—for the purpose of preventing the escape of sparks; does not know that it is essential to have anything else there besides the ash-pan and the stack, engines are not usually equipped with anything else in connection with the stack, to prevent the escape of fire; that is another type of engine that has some screen ahead of the grate in the furnace, that sits up here in an oblique position before the cinders have got up here to go out the stack, that is what they call a straight extension front; in that

(Testimony of T. W. Younger.)

case the netting would be down in front, and they use a straight stack, don't use the Diamond stack at all; they are not wood-burners, they do not use these extension fronts with wood-burners, to his knowledge, they were generally used as coal-burners; he doesn't know of this sort of engine being used for the purpose of burning wood; there are a few engines burning wood in the country, now, on the best equipped roads; don't know of any sort of engine besides the wood-burners that use Diamond stacks; this one was better constructed, on better lines, than some of the Diamond stacks that were used and are used to some extent; there is a great many engines using Diamond stacks that burn coal, they are not confined to the wood-burning lines; used them on Southern Pacific for many years for both coal and wood, this type of stack; it was common standard all over the Southern Pacific system; that was years ago; quit using them when they went into oil; they were using coal after they used wood, and still use these same stacks for coal; did not have any different equipment there to prevent the escape of sparks, with coal than with wood; they were exactly the same; they carried that same little screen in then; has no charge whatever of the Corvallis & Eastern, or of its rolling stock, and has nothing to do with the direction of equipment of engines; that sort of screen is one kind; there are others coarser than that, some use coarser than that in summer; for instance, he has seen them on the Northern Pacific engines running right in here—that is their

(Testimony of T. W. Younger.)

affair, not his; he never used that netting at all on his extension front, before he burned oil, he used netting common size, larger than that, than this (handling nettings); in the summer time, and winter time both; in fact got some extension front engines with a very coarse netting something like that; before they used them they took that out and put in what they called No. 7 netting; that was about 1904 or 1905; if there was a hole in that screen, the sparks would go through; the screen is lapped over like that, flanged over; there is a joint of red lead under or between the top part and the other part there and the netting; then there is a band goes around here made of pipe with a groove sawed in it; that slips over the whole thing here and tightens up here with two clamps and holds the thing together; there would be no excuse for fitting it by cutting the screen or adjusting the screen and happening to neglect or fail to get in a particular portion under that ring, so there would be a hole where the sparks could go through, that would be absolute carelessness if it was done that way, and he would say the man did not know his business; the engine he ran when he ran Diamond stacks, had a netting in here, but not like that, winter and summer, no matter where the locality, always had it there, they usually come equipped with that; in some cases that screen sits down below the lower part of the damper when raised, a little cut off the top of them, and in those cases when the damper was up the cinders would fall through only in case of the pan filling up full of cin-

(Testimony of T. W. Younger.)

ders, then there would be a cinder roll up; with wood-burning engines there would be very few cinders drop in the pan, would not fill one of those pans up from a wood engine in a month; coal-burning engines fill it up in two runs; screens did not come down in the engines he knew of of this type, they were a little lower, possibly, than that is, but there wasn't much of an opening, and not always a couple of inches, might be an inch sometimes, but they never considered that that was a defect, if they had, they would have built them up higher; no cinders could roll out of there unless the pan was entirely full; have been connected with engines for 34 years, and a witness a number of times in these sort of cases, two or three times; when he was an engineer he found that sometimes an engine would have difficulty in steaming; sometimes engineers open that trap door in the top there in order to help steam up a little, he never did it; sometimes a fireman or an engineer goes out with a poker and jabs the screen, that has happened quite often; when an engine comes in it is the practice in each properly equipped and properly conducted roundhouse, or shop, to inspect these engines after every trip; from experience that is found to be absolutely necessary in order to take the proper precautions against the escape of fire.

Whereupon upon redirect examination said witness further testified that these inspections are not based upon the report of the man who runs them, the engineer, they have what they call engine inspectors;

(Testimony of T. W. Younger.)

when the engineer comes in with an engine he makes a report, if anything at all is to be done; he is supposed to report it; and upon that it is supposed the master mechanic or somebody to whom the report is made, examines the engine; in addition to this they have regular engine inspectors who inspect every part of the engine; the run between inspections is between terminals, the distance varies, sometimes 100 miles, sometimes 150, sometimes 80; the inspection he refers to on Southern Pacific is between Portland and Junction City; if an engine got out of repair during the run, the engineer is expected to make a written report at the terminal he is approaching; if he made no report, an examination would be had just the same; don't know as he could tell how far it is up to Detroit and back to Albany, or up to Detroit from Albany.

**[Testimony of James T. Walsh, for Defendant
(Recalled).]**

Whereupon the defendant, to further support the issues in its behalf, recalled JAMES T. WALSH, who having been duly sworn, testified as follows:

That the netting and ash-pan were in good condition on the engine that ran from Albany to Detroit July 23, 1906, and in substantially the condition as indicated by the model; he heard a portion of the testimony of the witness Merle; Merle was foreman of engines in the machine-shop, his duty was general inspection and to see that the work was done properly; didn't inspect that stack, the stack of engine No. 1, after the fire in July, 1906, that is, when the

(Testimony of James T. Walsh.)

stack first came in and reported Mr. Merle inspected it and reported it in good condition after the fire; witness thinks it was on the night of July 23d, when the engine came in; this report was verbal; witness called the attention of Merle to examine all those thoroughly, and he called witness' attention to that netting in the stack—in the ash-pan, and witness examined it with him, and saw a little opening between the mud ring and the ash-pan proper; the length of the netting did not reach quite up to the mud ring; he repaired that; that was two or three days after the fire that it was reported, the first fire; when the netting is put in the ash-pan in the first place it should have been put in properly, and he was looking after that work; Merle, at the time of the second fire, and before that for a few days, was at the Breitenbush Springs; he had rheumatism, and and took a lay-off; went up there about two weeks, and was gone at the time of the second fire at Berry; that is, the fire that occurred near the McRae cabin; witness had not heard any more reports of fires occurring until that fire occurred on August 11th, hadn't heard of any more reports of fire or reports of nettings until that fire of August 11th; the engine up to and during the time immediately prior and immediately after the fire of August 11th were reported all right, the nettings were; engine No. 1 was running to the front on August 11th, J. F. Simpson was in charge as engineer; all the trains were rather light during that period; he had eight cars going up; he has a record of that, but not with him, has it at

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home, but knows that to be a fact, remembers it from the train-sheet, and has a recollection from examining the report; saw the train when it went out, and when it came in, it had eight cars, including the coach and baggage-car, they are always considered as a load; when hauling trains up in that country, as a rule, when the mills are not closed down, they handle from 18 to 23 cars; this day they had about eight cars; usually he made a trip about once a week up the line of the railroad, on the train, and then he takes a speeder about once or twice a month and goes over the line; knows the place where this fire is supposed to have originated on July 23d, down below the water-tank there some place; the grade there is a little up, wouldn't say exactly the percentage; it is rather light, though; less than one-half of one per cent; that is going east; the grade along the McRae place is about on a level right opposite the point where the cabins were; about Detroit the grade is probably $1\frac{1}{2}\%$ going into Detroit, that would be from Berry up; it lightens up a little in places; haven't a profile of the road with him; that spark-arrester was the usual one in use, and standard make.

Whereupon on cross-examination said witness further testified as follows:

He is not a practical machinist, but worked two years at the trade when he was learning it, before he went on an engine; have been running an engine fifteen years; went as fireman first, then became engineer; didn't go back into the shop after that until

(Testimony of James T. Walsh.)

about 17 years later; has managed to keep up with improvements and changes in the matter of machinery during that time that he was running an engine, and in the shops; the engineer reports the condition of his engine on a book, couldn't say where that book is now, although he saw them occasionally, but didn't examine them every morning; didn't examine them there as to this fire, not relating to this fire; the book was kept in the roundhouse on a desk, it was a book probably 10 by 16, white leaves—just a little pencil book; thinks no record was taken from that to another book; Merle told him the engine was reported in good condition, if witness happened to be there, Merle would tell him every day; he was there the following day, and inquired about the engine; Merle conversed with him about what Simpson reported, didn't show him the book, he didn't ask to see it; does not know whether he made report the following day, is not sure; the other machinist would report to him when Merle had gone to Breitenbush; did not go back and examine the report of the engineer after this suit was commenced in 1907, never made any further inquiry about it, never asked to see it; he called on Merle—they had blank reports that they used to make up—netting and stack, or stack and ash-pan report that they used to make out; Merle O. K.-ed them as a rule, he also made them out; they are at Albany, most of them, haven't any of them here; did not examine them before he came down; took no particular interest in them; the book was lost, probably somewhere in 1906-7; he asked Merle

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about it, he reported to him one morning that the book was missing; he asked him if he knew what had become of it, and he said he didn't, it was missing during the night; that was some time after he asked him for the report upon this fire case, he hadn't heard about this suit at that time; didn't ask him for the book, he reported to witness that it was lost, the work report book; Merle asked witness if he had seen it, he told him not; had not asked him for that report before he missed the book, he was the one that called witness' attention to losing it in the first place; engineer made general report of the work that he wanted done in the way of any repairs of any kind, and if he hadn't any trouble with the engine he made no report; as a rule, Mr. Merle would go around or he would himself, if he happened to be there, to examine and inspect the engine, but his duties called him away part of the time, being superintendent, he was both superintendent and master mechanic, and that took him out of the shop on the line, up and down the line; he had exclusive charge of the rolling stock, and with the assistance of Mr. Merle, he looked after the condition of the line; Merle did not go out on line and inspect or superintend it otherwise; the engineer would sign his name after reporting the amount of work that he wanted done; witness does not remember anything of the kind that on the 23d day of July, 1907, when Mr. Simpson got in that night, that he did report in that book Engine No. 1, hole in the netting, and signed it Simpson; does not remember of any reporting,

(Testimony of James T. Walsh.)

and does not know that he did report; don't remember anything of the kind, that he reported it was throwing fire right on up until after the fire of August 11th; does not remember anything of the kind, or that he reported it practically daily there; after Simpson reported that stack in the first place, the stack was taken off the engine; it was the 23d of July, 1906, he reported it was reported throwing fire, he did not report it was; does not know anything about it throwing fire, and big fire occurred that day in the Forest Reserve, but he knew there was a fire out there, and they took the stack off and examined it, and found no holes in the netting; does not remember that he put it on another engine which went down to Yaquina, and threw fire down there; Cas-teel reported that the stack was reported throwing fire; thinks it was after August 11th that he found what was the matter; didn't find what was wrong; Merle said he found a hole—not a hole, but where the netting had not come up to the ring, and he said he could place his rule in there; that ring covers about three inches on the top of the netting, and Merle, in the first place, knew all about the working of that stack; he had had it off and looked at it and examined it; don't know whether he had an object in not discovering it or not, couldn't say.

Whereupon counsel for plaintiff asked said witness the following questions:

Q. However, it was not discovered and threw fire and set fire, didn't it?

To which counsel for defendant objected as in-

(Testimony of James T. Walsh.)

competent, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

A. Yes, I believe that was the question.

Q. What is your answer?

A. I haven't answered it yet.

Q. Well, answer.

A. I don't remember Casteel ever reporting that engine setting fire. Engine 2 that the stack was placed on after August 11th.

Q. Yes, but do you remember that after July 23d that that same stack did throw fire and set fire?

A. I don't know where it set fire to. I never had a report of it.

Q. You did have a report that it was throwing fire.

A. Well, there was reports come in. It was reported that they were throwing fire.

Q. By the engineers?

A. Yes, sir, by the engineer, and the stacks were always examined when there was such reports made.

Whereupon said witness further testified that Merle asked for leave of absence, stating that he was sick and wanted to go to the Springs, so witness presumes he went; Merle took the train up there between July 23d and August 11th, and witness presumes he went to Breitenbush; does not know that it was before the fire at all, not at that particular time, and that he was out there fixing the engine that they ran off the track up there, and fell in the ditch; at the time of August 11th, Merle, he thinks, was at the

(Testimony of James T. Walsh.)

Springs, and knows this from his own evidence; the engines were not reported all wrong between July 23d and August 11, and they were not reported as throwing fire, not pretty near every day, but couldn't say how often; he was not fussing with that netting to see what was the matter; went over the line once a month up as far as Detroit, as a rule; he had charge of the line, looking after that; in the morning when that train went up they had 8 cars on it; he was in the yards at Albany, his recollection tells him that; that train goes out at seven o'clock in the morning; he was generally around there about six or six thirty every morning at that time; nothing different about that morning and any other morning to impress it on his mind, when this matter came up and he was called here, he looked up the train sheet, he thinks last Sunday; train sheet can be brought here if desired; saw the train go out, remembers that; the only thing that impressed it on his mind is the train moving around there; it is not true that it was impressed on his mind because he heard it was reported that the train set a big fire there, nothing at all impressed it on his mind; does not remember how many cars it had on July 10th, when it went out, or on the 11th; thinks it had about seven cars on on July 23d, knows that from the train sheet; kept train sheet daily, and the record is sent down to the general office at Portland; didn't see it down here after he came down; was not sent up there for his examination, it is a copy of that report that is sent here, he has those reports; the daily reports he makes at the office of

(Testimony of James T. Walsh.)

Mr. Buckley, General Superintendent, witness is not General Superintendent, but superintendent; does not think they had over three or four flat-cars they picked up at Mill City that day and hauled up that grade, they did not pick up any flat cars along the line before getting to Mill City; they haul box-cars as a rule up to Mill City, and anything else in the way of freight-cars, and with 18 or 20 cars those engines puff pretty strong to get up that grade; as a rule, have to throw the doors open and fire in wood to beat the band; you cannot haul a train without steam; with a heavy train as a rule, he does not know as it is any greater with a good stack, netting and everything; if there is a little hole in the netting, it can throw sparks, they will throw sparks on a light train, too, just as big as that hole is, but he does not know that they would throw more of them if it is a heavy load, and working hard, knows they will not; they will throw the same amount if a hole is in the netting; the harder they are steaming, the stronger the draft is, and more sparks being thrown against that netting; does not know that there is apt to be more get out, if there are more there; knows that from his experience as an engineer; trap is 12 inches in diameter on the engine; if anything gets wrong with this pin on the top, and it happens to work out or anything, and the trap is raised, it possibly would affect the steam and draft if the netting was stuffed up, but with free running netting it wouldn't; these cinders come up there with the force of the exhaust; they do not often wear out a couple of nettings in a

(Testimony of James T. Walsh.)

season, they do very often wear out with coal, but not with wood; as a rule, good netting will last a year with wood-burner stack; this is not a solid screen around here, it is made in segments; thinks there are five segments in that form of hood; those segments are fastened to the ring along underneath, to each segment on the side, it is riveted, that would make one fastening to each segment, of course where they butt there would be ten, but this don't butt, they lap over, five places where they lap there; he didn't think it was necessary to put segments in as a model, to show the general construction of the stack; that screen there is a kind of milk screen that he had put in; could not handle the netting very well in a small model; the reason it is made so heavy is because of the great pressure that comes against that screen; it is necessary to have a very strong screen to withstand the force of the sparks beating against it; after sparks pass through these cones they are all broken up, not very large; the top part of that cone is the proper shape, the hood part is round, absolutely circular, not octagonal; there are five places where those things are fastened, they make a lap, and they can't come out where ribbed well and riveted, he never had them come out; if they do come out, they are not ribbed on and riveted; it is not true that on each end of the segments there is a place where there might be a hole work in it, is there is, there should be double netting at that particular point—should lap over longer at that point than where the netting is single, because the piece that goes across helps to resist the

(Testimony of James T. Walsh.)

force of the sparks; the holes generally occur in the center in the single netting, if there should anything occur; witness thinks stack must be $5\frac{1}{2}$ or 6 feet high, but he has no recollection now of its height; on July 23d and August 11th he was running one engine up east, it got in Albany about six o'clock at night, then it was working in the yards an hour or so before it went into the shop, they switch in the yards—make up the train and do necessary switching; in the course of a couple of hours after it is put in the shop, when the fire has all burned out, you could inspect the netting, about eight or nine o'clock; went out of the house about six-thirty in the morning, so whatever inspection was done with that engine had to be done at night; by opening the front door and putting a light down and looking through, a man could inspect it when it is hot; he could tell the boiler—not the fire-box, but the front end of the engine, the smokebox; on that model there is the front end, that drawing (pointing on model); he would be on top and the light would be underneath; looking through along that netting, you can't see everything, can't see the trap-door, can't see the edge of the netting where it fastens, but can see some, the reflection of the light will show up the top of the stack, the reflection of the light underneath, the torch, as a rule, and then a man can take a torch on top; can't get in engine if engine is hot, not when there is no fire, no draft to put it out; the fire burned out as a rule in a short time, the fire burns out, and the engine cools off; it does that in an hour, so you can

(Testimony of James T. Walsh.)

stick your head in on top and examine, if you wish to; have done it myself, but not in this particular case; did it when he was running an engine; he inspected the fire apparatus when he was running an engine, frequently, probably before it threw fire, not afterwards; have examined the stack all right, it is the engineer's business to examine the stack, not in the roundhouse; it is his business to report something wrong on the road; they have a man in the shope to attend and find out what is wrong; it is a matter of curiosity on the part of the engineer to satisfy himself; on the back end of the ash-pan on that particular engine, he thinks possibly the netting came down here about an inch; the damper, as a rule, opens up that far, but you don't have to get the damper above the screen; don't think the screen came down below the hinges of the damper; it worked by a lever from the cab; Merle put on additional screens after the fires, at witness' suggestion; in the first place, the netting in the ash-pan is simply a precaution; there is no fire there; they simply drop down in there and the draft carries the cinders out; the netting is put in there as a precaution against it; a great many roads don't use netting at all; he takes them out in the winter time; put them in May, as a rule, whenever the dry weather shows up; have run on roads where they didn't carry them in summer time, not lately, though; the ash-pan of the engine is about seven feet long; there is a little play here, where it sits with relation to the direction the engine is going, that is, the length of the engine; sometimes they

leave the front door open, sometimes in the back, and when difficulty in steaming, they open them both; coal of considerable size drop into the damper frequently, as a rule, right under the grate; the grate surface in those engines is four and a half feet—that is, open space, and in the grates there is a dead space in the wood burning locomotive—what they call a dead ring; the space is about five-eighths inches apart, where the cinders fall through, and a rib in between that again about the same; thinks Mr. Stevens has profile of the grade of this track; knows nothing about the percentage of the grade up there except as he has seen it on the profile, it has been surveyed, and is supposed to be correct; it is not two per cent along there, he can tell the difference between one per cent and two per cent, or between a half of one per cent and two per cent, from observation; he considered grade up there about half of one per cent, possibly might be a little more, would not say positively; wherever there is a grade, if there is a system of curves, or a heavy train, it makes it difficult getting up the grade; it is not true that there is a grade all the way up the Santiam Canyon, of two per cent; it is flat in some places; it is possible the average grade is two per cent, but it is flat in a great number of places, and these flat places do not immediately precede a grade of two per cent; there are flat places up there half a mile long; the one in front of McRae's place is not half a mile long; couldn't say how long it was, never measured it; just before you reach it there is a curve, and just as you pass, there

(Testimony of James T. Walsh.)

is another curve a little ways on; just after you pass it going east it is a little upgrade, and just before you reach it an upgrade; as a rule, you would not cut out your steaming because you struck a little flat place, when approaching another, if you were steaming hard coming up that grade to the west; if he had a heavy train he would not keep puffing along, but would keep using the steam *the as* he had been; work hard when hauling train of 17 cars up there, a third of them flat cars empty; that is pretty good load for that grade; Merle had instructions to be sure and keep watch of those stacks and ash-pans during the time of these fires; they were not reported out of order previous to that; he inspected and kept track of them, they didn't have any regular boilermaker then, no stackman and inspector, only Merle and the man in the shop; in 1905 had an understanding with Merle that he was not to do boiler work unless he felt like it; that agreement extended up in 1907; he got a boilermaker when any necessary work to be done, and have had him inspect the engines every trip since.

[Testimony of J. L. Bean, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called J. L. BEAN, who being first duly sworn, testified on direct examination as follows:

He is a boilermaker; little hard of hearing; resides at Portland; foreman boilermaker for the O. R. & N. Co., have been in that business about forty years; am acquainted with the construction of coal-burning

(Testimony of J. L. Bean.)

engines used upon the railroads in Oregon and elsewhere; not acquainted with class of engines used for wood burners; have not had experience with wood-burners for years; knows the construction of smokestacks; smokestacks for coal are of considerable different construction than this; he does not have the handling of them; this is a simple wood-burner stack (pointing to model) and his experience as a boy—they used to manufacture the same things thirty years ago; that is about the model of the stacks that were built about thirty years ago; since that time the railroads he has been working for have been using coal; he has not had any late experience with them, but that is about the model of stack they used to build years ago, haven't changed very much, what little he has seen of them; have built a few of these of late for different engines that have been sold for the O. R. & N., but have never come in contact with the way of working—he builds from a drawing or blue-print; the screens they have used thirty days ago and to-day differ; he knows the kind of screens in use at the present time; he has built these engines of late; not over thirty years ago he built one of these engines and put netting into it; it was not one of their engines; it was sold to another firm; they used 8x8 and he thinks No. 17 mesh; he would not be sure, but it is the same thing; sent from the S. P. over to them; they don't carry it in stock, but on account of equipping this particular engine they sent that netting over from the S. P. there, where they used to burn coal—for him to apply on this particular

(Testimony of J. L. Bean.)

engine; that is the standard wood-burning netting at the present time; he used them for years on the Southern Pacific, where they have been burning wood; a number of cases they have sold engines, some particular small engines, down at the O. R. & N. and have turned them into coal—or from coal into wood, and they applied that kind of netting in the stacks; that is the form that he put in engines that he rehabilitated recently; the coal-burning stack is a little different from that, you don't have any trap in it, and use coarser netting; thinks this is No. 8 mesh and No. 17 wire, but would not be sure; has no rule; you would have to have a gauge to gauge the wire; thinks that mesh is 8x8.

Whereupon upon cross-examination said witness further testified as follows:

They use coarser mesh in coal-burners; you couldn't get any steam up in that; in some cases these Diamond stacks are used for coal-burners; they have a number of their engines equipped with Diamond stacks, and the best engines they have; that is the class of netting used in the dry season, this 16 wire, No. 7 mesh, he uses that in the Diamond stack in the summer or dry season; this 4x4 No. 13 gauge they use in the winter, in the wet season, on the Diamond stack; this is front end of the engine, extension of the front end.

Whereupon on redirect examination said witness further testified that that is the size used in the dry season on coal-burning engines, in the Diamond stack; this is not a stack of that kind; that is for

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(Testimony of J. L. Bean.)

wood burning; this is for coal; he means the Diamond stack.

Whereupon counsel for defendant offered in evidence the summer netting, marked Defendant's Exhibit "E," to which exhibit reference is here made, and the same made a part of this Bill of Exceptions, and so identified.

Whereupon counsel for defendant offered in evidence the winter netting, marked Defendant's Exhibit "F," to which exhibit reference is here made, and the same made a part of this Bill of Exceptions, and so identified.

Whereupon upon recross-examination said witness testified that the O. R. & N. do not carry any diamond stacks on the regular line, burning wood; they do some in coal, at Albany, and different divisions all over the road; use them out of Portland some, between here and Umatilla and The Dalles, use them on the Washington Division; he is not on the witness-stand to misrepresent anything like that; you have to take the stack apart to change the netting, in all cases, you have to take it apart here, this diamond here, just take this part out, you don't have to take any sections out at all, just take these two sections apart; they have different apparatus to lift it out of—off the engine, some places an electric crane, other places in the roundhouse they have to use a rope pulley; as a rule, they have lugs left here and a cross-band, so you can catch it and pull it up; never passed a stick of wood in here and pulled it

(Testimony of J. L. Bean.)

up by the trap-door opening, that would possibly put a strain on the netting; he never saw anything like that, never tolerated anything like that himself.

Whereupon on redirect examination said witness further testified as follows:

That for wood-burning the stack is so much heavier than coal-burning, presumes possibly it would weigh somewhere in the neighborhood of 350 pounds—from that to 400 pounds; his coal-burning stack weighs in the neighborhood, all equipped, about 275 pounds to 300 pounds; for Diamond stack it takes about fifteen minutes to examine the engine when it comes into the roundhouse in the evening, you take a torch and light it and examine; sometimes examine an engine without fetching it in at all, as long as the blower is not on and it is not working steam, you can take a light, and on a day like this you can examine without a light at all, can see down from the top; anyone that knows what a hole is when they see it can examine one.

Whereupon on recross-examination said witness testified that there are segments in wood-burning, not in coal, they put in segments; if they should put a screen in there so as to leave an opening here that you could shove a rule into, or the same thing occurred there by reason of turning the netting down, and that was examined a half dozen times and not discovered, that would be carelessness on the part of the man who put it in in the first place; a space there, as a rule down at the bottom, might possibly be overlooked, but on there (pointing) is right in front of

(Testimony of J. L. Bean.)

your eyes, and should not be overlooked; if that is allowed to occur at all, it is not properly put in.

[Testimony of George Wilds, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called GEORGE WILDS, who being first duly sworn, testified on direct examination as follows:

Resides at 814 Greenwood Avenue, Portland, and is general foreman of the locomotive department at East Portland, at the car-shops, for the Southern Pacific Company lines in Oregon; have held that position since 1908, with the exception of three years from 1901 to 1904; has been engaged in that business since 1883, right at the same point, East Portland shops; acquainted with and know the construction of smokestacks for engines as used in the railroads in Oregon; they have been built under his instructions; that model of smokestack is one of their standard make of stack that they have been using for a number of years; this piece of netting is their standard netting, what they call 12 mesh, No. 17 wire, Birmingham gauge; they use that in their wood-burning stacks when burning wood; that is standard netting in diamond stacks; that is a model of it; the netting is put on top, what they call the trap, it is put on inside the cones; that is what they call a cone, for the purpose of breaking up the cinders, after the cinders leave the standpipes; this interior pipe is the standpipe; the cinders comes here and deflect down and the draft hits it again and throws it out, by that time they are practically destroyed, what is called

(Testimony of George Wilds.)

dead; the vacuum space in the stack is supposed to kill them; after that they will remain in the stack and fall down inside, where they can be removed when the engine comes in; there are openings put in the stack, right on the inside; these cinders go down in there and lodge in front—in the front part of the engine; that is what they call the smoke-box; witness is acquainted with the ash-pans on wood-burning engines; that is standard model of their ash-pan, the one they are using; the netting that goes into that looks to him like a No. 6 netting, it is about a No. 12 gauge wire, he should judge—14; there is no way that the cinders or fire can drop through there, if bolted up securely; there is no way for the fire to go through there if everything is in good condition; if the netting should be short there, on the other end, there would be a possibility of the coals getting out—the draft would have a tendency to lift the cinders, if the nettings were short, the chances are it might; the drafts carry it up; of course water is running in here occasionally; whenever the injectors are worked the water will flow from the injectors and is discharged in here in a good many cases; that causes dampness to the cinders, and then they fall down and the draft would not have the same effect on them as if in a dry state; the water runs into the ash-pan, if the fire drops in there, or hot cinders, or anything of that kind, the water would quench them.

Whereupon on cross-examination said witness further testified that water runs in there whenever you open the injectors; they open them oftentimes on

(Testimony of George Wilds.)

a heavy train they are running steady, again on intermissions; if a boiler requires any more feeding, the injectors are required again and put in operation; to some extent there is liability of a spark escaping if the dampers are open and the netting short, if the wind is blowing; he always leaves screens and nettings on, summer and winter; this thing is made of cast iron, perfectly round, not octagonal; the cinders are thrown into the stack and up into this cone here, with a great deal of force, and the draft that is coming through the screen above comes through there with a great deal of force, especially when the engine is working; the cinders deflect this way, the tendency is not upwards, it is deflected; when the cinder escapes through the turbines it goes kind of twisting; that part of the cone, the flat surface on top, will to some extent tend to eliminate some of the suction from the draft immediately above, passing through the screen; there are not cinders against the entire surface all the time, just part of it, not especially up toward the center; you never find the netting wore out through here; here is where, generally along in there; (pointing on model) that slight inflection will have an influence on the side there to some extent; they are thrown out against the sides all the time; whatever the size of the hole may be, there will be a cinder of that size escape through it; when the netting is in good condition there are no cinders escape, no small sparks, the vacuum space will kill the small sparks, the vacuum that is created; if the mechanism is in good shape, the sparks that are playing against

(Testimony of George Wilds.)

this screen do not escape; of course if any escaped they would be very small, not a shower, even when the engine is working hard, you couldn't see the sparks, not if the netting is in good condition; if an engine throws sparks with every puff when they are working hard upgrade, it shows a defective condition of the netting; when an engine is in good condition practically no sparks are thrown; if it does, they are very small, to such an extent that it is hard to define; take it in a practical way, that is the most practical device that could be invented to control fire; they have always considered this model of stack the most safe stack that they have; have never seen any of them stacks in good condition where he could see sparks, even at night; have rode on engines at night quite a bit, and has seen sparks escape, and concluded the engine was out of order.

Whereupon on redirect examination said witness further testified that that stack has proved the most satisfactory in the way of preventing the throwing of fire, that they experienced, and they have been using it for many years.

[Testimony of J. F. Simpson, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called J. F. SIMPSON, who being first duly sworn, testified as follows:

Direct Examination.

Resides at Portland; three or four years before he moved to Portland he was locomotive engineer, ran an engine between Albany and Detroit; followed that

(Testimony of J. F. Simpson.)

run ten or twelve years; on an engine prior to that time, between Yaquina and Albany, on that route thirteen or fourteen years; on an engine prior to going on the Yaquina run, on the O. R. & N., worked on the O. R. & N. one year; had experience as a fireman before that time, from Sacramento to Truckee; he was running and operating the engine that was on the run from Albany to Detroit on July 23, 1906; haven't seen a report since he has been off the road; trying to recall what kind of a train he had, he says there are some days they have heavier trains than others, according to how they get the logs out at the front; if they got out 12, 14 or 15 cars, they have those cars back on the return trip in the morning; could not tell whether they had 4 cars or 15 or 20; it has been over four years, and he has been off the road three years; don't remember how many cars at that time, remembers about the fire that occurred there near the water-tank; the first he knew of it was after they had gone up and returned, they were at a woodpile and some of the brakemen or trainmen or some of the passengers were helping wood up, and said the fire started this side of the water-tank; that is all he knew about it; he didn't see the fire himself at all until the next day when they returned; saw a fire started; there was a fire still burning; going west at that point there is a little downgrade; there were pitches, going east was upgrade, going west downgrade, and practically level until you got to those pitches, the train would run itself; about the water-tank there it was level, for three or four hundred yards, something like that;

(Testimony of J. F. Simpson.)

always take water going west, and stopped there as you go up; don't know anything about taking on some passengers at the water-tank, or about there somewhere; don't remember anything about some campers being down there, but take it the summer time, there was a great many campers would get on at the water-tank; he didn't pay any attention whether any got on that day or not, but know they did get on at the water-tank; people up there hunting and fishing; he always stopped at the water-tank, and they seemed to know it; as far as he knows the condition of his engine was all right at that time; didn't see any fire; if it had been throwing fire particularly he would have noticed it; Richard Casteel assisted him as fireman, he was a first-class fireman and careful man; he took the engine to the shops that evening; Mr. Merle was in charge of the shops; he reported, made out his report in the book; he met Mr. Merle by the water-tank, he thinks, and spoke to him about the engine throwing fire; don't know what he said about it, or what was done about it; he took the engine out next morning, at nobody's direction; it was hot and ready to go out on the run; was in charge of Mr. Merle; he thinks it was two or three days after that that someone said the engine was throwing fire; he got in and made out his report again; don't know whether he spoke to Merle about it or not, he always looked at the book; Merle never would receive any verbal reports from them at all; after that he changed the engine for the purpose of repairing this particular one, and the next day sent out another engine

(Testimony of J. F. Simpson.)

and kept this one in there; kept it there two or three days, something like that, and at that time he turned the engine over to witness again; after that didn't find anything wrong with the engine, kept right on operating it right along; knows about the fire at McRae's cabin on August 11th; the fireman and he were sitting on a log in the shade of the school house at Detroit,—don't know whether he called witness' attention or witness called his attention—to a fire down the canyon; couldn't tell how long that was after he had gone through there; they had to go up into Breitenbush to do some switching; an hour and a half, two hours, maybe; done a lot of switching at Breitenbush river, as near as he can remember; sometimes went on up to Detroit, sometimes didn't; were just eating our lunch then; when they came to Berry his fireman says, "That fire is around the point," and when they rounded the curve and came off the tangent, they could see the fire at McRae's cabin, it was just burning there, it was up the side of the hill also; the wind was blowing up the canyon at that time; couldn't tell whether it was strong or light wind, it always blows up the canyon; did not stop at McRae's cabin as he went up that day; as far as he knows, his engine was working properly when he went east that day, he didn't see anything wrong with it; no sparks emitted when he went east that time, that he knows of; the grade along about McRae's cabin is very near level; did not have conversation with Mr. Merle a few days after the first fire, in reference to the smokestack, but thinks he made out the report that evening when he

(Testimony of J. F. Simpson.)

came in, and think he met him by the water-tank, am pretty sure he did, and told him they said the engine was throwing fire; don't remember whether, a day or two after that, he had a further conversation with Merle in reference to it; he always used the engine careful, of course, it was to their interest to.

Whereupon on cross-examination said witness further testified that every time they would hear of a fire, it was naturally laid to the engine; every time they heard of a fire, of course they would report it, so if anything was wrong, they would be clear, protecting himself; don't believe he reported a hole in the netting; he just said the engine was throwing fire; don't believe he wrote in the book "Hole in netting" and signed "Simpson," because he always made a report that the engine was throwing fire; never found any hole in the trap-door netting, if his fireman did, he never said anything to him about it; he thinks Mr. Merle said something to him about that hole in the trap-door netting; after that, after he understood that was fixed, they reported it still threw fire, reported it to him, and he signed the book to keep himself clear, so he would not be charged with any carelessness in the matter; about every other day he carried a heavy load of empties from Mill City up east to Detroit, most every day, unless they had an accident at the camp; should judge they hauled about an average of 15 flat cars, empty flat cars, that made quite a load; it is flat for two miles just before you get to McRae's cabin, very little grade, it was easy pulling up there with a big load of empties and the

(Testimony of J. F. Simpson.)

balance of the train; it is level until they get to a little swale just the other side of Berry—about 300 feet along; don't know whether they set fire or not when they passed McRae's cabin, if he did, there must have been a good-sized hole in the netting; it is a fact that these nettings throw more or less fire all the time; even when they are in good condition, you can't work an engine anyways heavily without they throw sparks or cinders; if the stack is in good condition sparks may be thrown when the fuel is burned down, but they will go up two or three feet, maybe, and go out; railroads make it a point to keep the rights of way clear of combustible matter along their tracks; if the netting is in the first-class condition, it will not set any fire, not even if they fall on wood, before they start to go down they are dead; of course they may be warm when they strike the ground, but they are dead, if the stack is in first-class condition, and if in ordinary condition, about the same thing, he thinks; could not tell at what time he ate his lunch at Detroit that day; they got there as soon as they possibly could, ate, and left; whether they got up there on time depended on the amount of work they did, or whether they got into any trouble; ate lunch about one o'clock; never passed Berry on time, always late; forgotten the time they were due, it was about eleven—half past, somewhere along in there; they probably would get at Berry about twelve o'clock; does not remember whether they went to Breitenbush; ordinarily commenced eating lunch about one or a little before; it was according to how

(Testimony of J. F. Simpson.)

much work they had at Breitenbush, or whether they had to go up above to Hoovers; saw this smoke from about Berry while they were eating lunch; didn't see the fire there when they went by, going up; this was perhaps two hours after they went by; where the fire occurred is about three miles this side of Berry; at one o'clock when they sat down to lunch, the fire had assumed such proportions that they saw smoke at Detroit; it was quite a fire by that time, expects it had been burning several minutes when he first saw it; it had to do that before the smoke would get big enough for him to see it up there; didn't see any fire there when he went out from the water-tank there; didn't see it until the next day, didn't see any fire until the next day; a stump or log burning along the right of way would not attract his attention very much anyhow; it might have been on the other side, and he never noticed; at the woodpile the crew or some of the passengers, doesn't know which, said fire this side of the water-tank; the woodpile is down Fox Valley—sometimes the other side of Gates, don't remember exactly where they took wood that day, but all their wood is west of Gates; that would be approximately 15 miles from the water-tank; probably take two hours to reach there after he passed the water-tank; the fire must have been there as he passed, but he didn't notice it.

Whereupon upon further cross-examination, said witness testified that the engine, when he took it out about six thirty, was heated up ready to steam, that was done by the night watchman, not by Mr. Merle;

(Testimony of J. F. Simpson.)

knows Merle went up to Breitenbush Springs that summer; he went up on the engine with witness part of the time; remembers he went up and took a vacation—rode on the engine part of the time, couldn't remember what time it was, quite a little after the last fire, as near as he can remember.

[Testimony of R. L. Casteel, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called R. L. CASTEEL, who being first duly sworn testified on direct examination as follows:

He is locomotive engineer; has been engaged in that work four or five years; prior to that time was fireman on the Corvallis and Eastern Railroad; was fireman in July, 1906; J. F. Simpson was running with him at that time; wasn't firing on the 23d day of July, 1906, don't know anything about the fire; was on the engine in August at the time of the second fire; does not remember particularly what kind of train they had that day, but they had been hauling light trains for a day or so; there were two men about the cabin of McRae, where this building was burned down, as the train passed up, does not know who they were, have never seen them since, to his knowledge; saw smoke at Detroit, while they were eating dinner there; they ate their dinner sitting on a log right in front of the schoolhouse—between the schoolhouse and the track, J. F. Simpson was with him; the engine was operating all right that day, so far as he knew; don't know about its throwing sparks, didn't

(Testimony of R. L. Casteel.)

see any; when they came back the whole side of the mountain was afire, clear down to the railroad track.

Whereupon on cross-examination said witness further testified as follows:

Couldn't tell what time of day they passed Berry, or passed McRae's cabin, haven't any idea, because he don't know whether they were late or in time, or anything about it; if they were on time, they got there somewheres along between ten o'clock and eleven o'clock; they weren't due at Detroit until 11; it was usually after 11 when they got to Detroit; he had been running on there a couple of years at that time; don't know exactly how long; going up he rode on the left side, his own side; the fireman is always on the left side; he saw two men at McRae's cabin; don't *men* they were right at the cabin, but they were right close to it, within 25 or 30 steps; has seen other men along there; didn't see any men as they passed the water-tank that day, or the day before; the day after the fire he wasn't firing, did not go down there, he was at Albany; could not describe the men he saw at McRae's cabin, except they were dressed in light outing suits like campers generally wore when taking their outing in that country, just like canvas suits, couldn't say whether they had leggings on, didn't pay any particular attention to how they were dressed; they were average size men; no guns with them; they had fishing rods, and one had a basket; never seen them since that he knows of, or ever before; did not look as if they lived in that part of the country; never saw them down around Albany afterwards, that he knows of, or

(Testimony of R. L. Casteel.)

up at Detroit; one reason he knows it wasn't the day before the fire when he saw these men, is that he thought of those men the first thing he thought of when he saw the fire; he might have remarked to Mr. Simpson about them, right then and there, that these men probably had set that fire; didn't occur to him that his engine might have set it, because it never did set any fire, not that he knows of; they weren't scattering fire up and down the track there every day for two weeks, and they did not set a carload of wood afire just about that time, not to his knowledge; don't know that when the bridge gang would go up the track there that they had to put their coats under the hand-car to keep them from getting afire, and does not know that Christensen got his coat set afire and burned up about that time; what he heard didn't count, he had heard all kinds of remarks before and since he has been here; did not know that engine had a hole in the stack, didn't hear Simpson discussing the matter of the engine throwing fire; thinks those men did not have whiskers, either of them; they were smooth shaven; couldn't say whether they wore spectacles; did not report to Mr. Walsh or any member of the railroad company that he had seen two men up there; couldn't say when he first told any officer of the company, or representative of the company; he heard all kinds of rumors in regard to the fire, and it was charged that the railroad company had set it afire, but he didn't feel it his business to go and tell the railroad company that he had seen two men up there; it was none of his business; started firing on

(Testimony of R. L. Casteel.)

the C. & E. about 11 years ago; prior to that time did a little of everything; principally stevedoring around Yaquina Bay, for a year or such a matter; those men were standing alongside the track, one on one side and one on the other, looked to him like they just stepped out to let the train go by, standing waiting for the train to go by; he didn't notice them at all until right close to them, for the simple reason that he couldn't see the track until he got close; they were at McRae's cabin at the time, standing about 8 or 10 steps away from the track; one on one side and one on the other, of the track; should judge they were nearer Berry, it is quite a ways from Albany out there; they were just a little east of McRae's cabin, toward Berry, 8 or 10 steps, he should judge; don't know whether they ever went near McRae's cabin, but should say they were there; don't know whether they went up to the cabin or not, and don't care; they were apparently going towards Berry; there had not been any fire at the cabin when they passed, that he knows of, didn't see any sign of fire.

[Testimony of A. M. Mulkey, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called A. M. MULKEY, who being first duly sworn, testified as follows:

Lives at Camp 6, near Mill City, Linn County, Oregon; in 1906 lived at Sower's Camp, that is about a mile—two miles this side of Detroit, that is west of Berry; was living there in August, 1906; remembers the fire that occurred along about the 11th of August; about that time there were some people camped along

(Testimony of A. M. Mulkey.)

down near the McRae cabin; thinks there were three men, does not know who they were.

Whereupon on cross-examination said witness further testified that he couldn't tell exactly how long before the fire he was down to McRae's cabin; he was down there every few days; it was along about that time he was right there; couldn't tell how long before the fire it was when he saw those men there, two or three days before; he wasn't down there the day of the fire at all; don't know whether they were there at the time of the fire, never talked to them; thinks they were camped at Spaulding Camp, about a quarter of a mile above the McRae camp, toward Berry; does not know whether those men ever went down to the McRae cabin in their life, don't know if they were camped in the cabin, in the Spaulding cabin; witness was passing along the track, and happened to see them, they were simply standing around like any other men camped out; don't remember whether they had a fire; they were outside the cabin when he saw them; don't remember of any fire, seeing any fire; all he knows he heard they were camped there, but knows they were there, saw them; don't know whether they stopped there at night, or whether they ate there, or whether they had any camp there for cooking; Spaulding's camp is about one mile from Berry.

Whereupon on redirect examination said witness further testified that it is a general custom for people to go up there and fish during the summer season, camp up and down the river.

(Testimony of A. M. Mulkey.)

Whereupon on recross-examination said witness testified that they camp all along from Sardine to Detroit, they camp a great deal about the Sardine, below the water-tank, down the river, the camping ground is right at the railroad track, or close to it, at Sardine; Sardine is a little creek two or three miles below the water-tank; knows where the Curtis Lumber Company's store was in Detroit, at that time, it is not a fact that he ever said anything about seeing a fire on the roof of the McRae cabin, or upon the cook-house, while passing up the track within a few minutes after the train upon the day of that fire; he never said anything of the kind.

[Testimony of E. C. Clair, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called E. C. CLAIR, who being first duly sworn, testified on direct examination as follows:

He resides in Oregon; have been in Oregon a little over seven years; in the logging business; engaged with logging companies for a good many years, in the east, and here, probably twelve or fifteen years; is engaged in the logging business at the present time, at Yacolt, Washington; is acquainted with the timber in Oregon, fir timber; have been up the North Santiam River; have been to Halsted and north of Halsted into the body of timber there; that body of timber up that way is somewhat similar to the timber he has been working in over in Washington; have had about six years' experience in working timber that has been burned over by forest

(Testimony of E. C. Clain.)

fires so that the crown has been burned and killed the trees; in his experience there is no depreciation in value by reason of a fire of that kind, up to the end of the second year; then the sap is lost, after that there is no further depreciation for a period of about three years after that; the first two years practically no depreciation, not in their case; been working for six years in burned timber, continuously every year; the second year there is some depreciation as far as the sap is concerned, the sap is lost, after that there is no change to speak of, for three years after that, then a small borer worm gets in and destroys the smaller timber, the larger timber is good yet—all except the sap and an occasional place where it is rotting in beyond the sap; the timber they are working in was in a burn more than seven years ago, it was burned September, 1902; they have been working extensively in it; the value of the timber is practically as much as it ever was; the thickness of the sap on the tree that runs from 36 inches up to five feet would vary from an inch to three inches, it will vary considerably, it depends somewhat on the timber, in his experience it has averaged two inches; they were operating for the Clark County Timber Company, he is manager of that company, and secretary and manager of the Twin Falls Logging Company; the Clark County Company owns the timber, the Twin Falls Logging Company does the operating; he doesn't have charge of the operating in the woods, he attends to this end of the business, and goes into the wood practically once a month for a

(Testimony of E. C. Clair.)

time, and sells all the logs, and attends to that end of it; up to the second year there is practically no depreciation; from the second to the fifth year—for that period he would say there was a loss of about thirty per cent; after five years it is uncertain, it depends on the kind of timber; on the yellow fir the loss would perhaps be forty per cent; on the red fir it would probably be a total loss for marketing as a commercial log to sell in this market, after *five* years.

Whereupon on cross-examination said witness testified that they logged over in the Yacolt burn; that was both red and yellow fir; part of that is a total loss at the present time, that is the red fir; the loss in yellow fir is about thirty per cent up to about seven years, after that he thinks forty per cent, as far as they have gone; so far as the value of the tree is concerned, whether a burned tract would have the same value as a green tract the first year after it burned, depends on whether you want to operate right away or whether you are carrying it as a long time investment; if you were going to operate the same year, it would have just as much value, if not more; if you were not able to operate it, it would have a lesser value; lots of places you could not turn timber off in a year, nor in ten years in some places, in places of that kind it is a total loss immediately on being burned; it is impossible for the fire to cook the same immediately in a great deal of timber, because the bark protects it, but the breakage is an item, and the loss is considerably more in a burned and dead timber, than in the green timber, from breakage, he

(Testimony of E. C. Clair.)

figured that in in his thirty or forty per cent estimate, some loss in sap, some in breakage; a little bit occurs immediately after the breakage; in their case it was about five years after the trees were killed that the borer worms attacked their red fir, they attack it first near the butt, and thinks they work up, because he didn't find them in the top until later; the sap is total loss at the end of two years, and it is about six years before the worms get into the heart of the tree; their progress in the heart wood was more rapid, in their case, as they go through the sap they get strong, and go right in for all they're worth; at times he found that when they cut down a tree of that kind they would lose a butt log, and still have a log above, but generally found it all over, but the worms went in further in the butt, and some cases they found logs in the top of the tree that were good, not attacked at all; don't recollect of finding any logs that bore worms had gone into the top and not the butt; this is from careful and actual observation for quite a period of time, it might be against some theory or some scientific statement; this loss sets in much earlier in some localities than in others, and the effect of the fire has a greater percentage of loss upon the timber in some localities than others; in this Yacolt locality that they worked, quite a tract had to be abandoned altogether at the end of six years, that was red fir, and what they term bastard fir, it is an intermediate grade between the yellow and red; don't think any of this in the abandoned tract was yellow fir; the expense of logging that stuff is about

(Testimony of E. C. Clair.)

one-third more, after the sap is gone and the tops of the trees are dry and brittle; about the one and two years, logging is cheaper than it was when the timber was green, on account of the underbrush all being burned and plenty of chance for men to get around and make roads and work; they would not charge any less, however, for they had a contract price for logging it; it didn't cost as much to log, but they charged as much, but they also didn't charge any more when they logged dry timber, which cost a lot more; one offset the other; they made a little more the first two years, and lost it afterwards.

[Testimony of J. H. Stevens, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called J. H. STEVENS, who being first duly sworn, testified on direct examination as follows:

He works for the Corvallis and Eastern; is bridge superintendent for the road; remembers of a fire occurring not far from the water-tank, up west of Granite Mountain, near Mile-post 131; he was there on the 25th of July, in the afternoon, arrived there about four or five o'clock; went up on motor car; thinks there were section men there when he got there; there was another man there, too, he thinks it was the Forest Ranger; when he arrived there the fire was about mile-post 130 $\frac{3}{4}$, just west of bridge 273, near what they call the Big Drift—a big log jam, that is probably half a mile west of the water-tank; the fire was on the north and south sides of the track when he arrived there; witness went up to Detroit

(Testimony of J. H. Stevens.)

the first thing, and wired Mr. Walsh for help, then went back down there, got down there about dark, probably about seven o'clock—the section-men were there—stayed there a while, and the fire burned on, passed on and died out at that point, and burned up the side of the mountain; right at the bridge there was no fire just there, but west at that point, at that rock in there, there was some fire; at the bridge the track is close to the river, there is a big jam there in the river—trees and logs; the section-men did what they could toward getting the fire out, and preventing it from getting to the bridge, it was very easy to do that; what they were afraid of was the bridge, sparks flying into the bridge, nothing near the bridge to catch fire except sparks dropping onto the bridge; the sparks came from up the side of the hill where the fire was burning, they would go a long ways; the fire was burning up the side of the hill probably as far as 300 yards, and it was quite steep there; fire or some kind—bark or limbs—would be carried by the wind; it has not extended very far on the south side of the track, towards the drift, because it was right close up there, it is all rock right along there, but west of there a few hundred feet it is farther away from the river, and some timber, a few trees in there, and underbrush that was burning; he thinks the section-men were fighting the fire over there, thinks Mr. Guthrie was there; witness passes up and down once a week; he had been up and down there a few days before that, couldn't say what day, but a few days before; at that particular time he couldn't

(Testimony of J. H. Stevens.)

say whether there were campers along there; in the summer time, most any time, you can see campers, but could not say where they were; have seen campers along there, but couldn't say what dates, and it was different places along.

Whereupon, on cross-examination, said witness further testified that he lives at Albany, lived there then; he generally aimed to make trips up along the right of way once a week, sometimes went on regular train, sometimes on motor car, that is, gasoline motor car; the bridge he speaks about was just west of the water-tank, about half a mile; bridge was probably a couple of hundred feet east of the fire; don't know where fire started, that is where it was and was burning just west of there when he got there; the big fire was on the north side of the track; couldn't say whether it caught on the south, and the sparks had fallen down off the hill and set fire on the north side; worked to see that the bridge did not catch fire, he thought those sparks coming from the hill would set the bridge afire; don't know whether any came across and set fire; it was burning when he got there; noticed lots of cinders falling down across every way; thinks he saw some falling across the track; that was the 25th; it had not spread across the track very far south, maybe a hundred feet at that point where the fire was the river was a little further away from the track than it is at the bridge; the fire on the south side of the track was at mile-post 103¾—just a few hundred feet west of the bridge, that is close to it, anyway.

[**Testimony of H. M. Guthrie, for Defendant
(Recalled).**]

Whereupon the defendant to further support the issues in its behalf, recalled H. M. GUTHRIE, who having been duly sworn further testified as follows:

He lives at Corvallis, Oregon; were at Detroit about July 23, 1906, the time of the first fire; got down to the point where the fire was supposed to have originated on the afternoon of July 24th; when he got there the fire was along on the side of the mountain, north of the track; no fire burning on the south side of the track, not on that day, afterwards there was; found fire on the south side of the track about dark of the 25th, he was there fighting the fire and watching it along the track and there was a Mr. Stevens, the bridge-man, came along on an electric motor and helped us there fighting the fire; there were some section-men there, they went down the track to get something to eat; there was a large snag stood above the track, probably a hundred feet high, which was dead, the fire had got up into that and kept burning away there, and pretty soon the bark began coming loose and falling, the sparks flew right across the track, there is a curve around the point there—flying over the track, and the first thing they knew the fire was burning the other side of the track, on the south side; effort was made to prevent the fire getting into the Big Drift; they never noticed the drift for some time, they fought the fire to keep it from getting onto the railroad bridge; then Stevens, the bridge-man, got on his motor and went up the

(Testimony of H. M. Guthrie.)

track to Detroit to wire for help, and pretty soon he noticed there was a big drift or jam of logs in the river there; he was afraid if it got into that it would go over the south side and go up the mountain; had a can there and some wet sacks that he carried the water out from the creek, and fought it out of the moss and grass around there and kept it from going over into the drift; fought it until about ten o'clock that night; there would be large cinders and things of that kind from those snags up the mountain side and fall there on the ground in and about the bridge; had been to Detroit; saw fires left burning by campers, in that neighborhood, about this time, put out a camp fire that was left by campers, between August 6th and 11th, on Sunday morning; it is a fact that there are campers all along up and down the stream there at various places; saw a good many campers during the summer; there was a large party camped just above Breitenbush bridge or spur of the railroad there; saw where these people had been camped in the cabin in where the fire started, when he first went there; that was the first thing he did, go to that cabin and see if anybody camped there, and he found fresh fish tails and the tail of a big salmon nailed up on the wall there; he had seen different parties in the mountains at different times before that, along the river fishing, and at Volcano Lake, a party went in there prior to that; Volcano Creek empties into the Santiam, the north fork of the Santiam not far from opposite the McRae cabin; it was some time prior to the fire, in July, that a party had been there;

(Testimony of H. M. Guthrie.)

saw where there had been fresh evidence of campers down just below the water-tank, on July 24th, when he went down there; camped in the cabin himself afterwards, when he was fighting the fire; some person had occupied it just prior to that time; helped Mr. Cahoon make survey of land burned over; they just ran lines across the area in the widest places, and he presumes Cahoon platted it in around that; did not chain around the edges or across the ends, it was simply an estimate that he made of the acreage, he would judge; if he remembers right, they started to do that work on October 10th, established camp there, found a section corner that afternoon, and started to work the next morning; referring to his memorandum, they stayed there at Whitman's cabin until the morning or at noon of the 16th, then went up to Detroit and worked from Detroit, and worked there until the 19th of October; on the 20th Mr. Cahoon and Mr. Hayes and he went and sowed some grass seed over by the mouth of Volcano Creek, on the south side of the river in this fresh burn; on the 21st they went from Detroit to Independence Prairie, about 21 miles east of Detroit, that is up on the North Santiam river, and returned to Detroit on the 30th of October; don't know when Mr. Cahoon left there; he and Cahoon went into the Hot Springs the first day of November, and came out again on the 9th or 10th; he was furloughed on the 10th of November, and left there, and knew nothing more of Mr. Cahoon from that on; they were nine days in making the examination of the burned district in and about the

(Testimony of H. M. Guthrie.)

territory burned over by these two fires.

Whereupon, on cross-examination, said witness further testified that he don't know how long before the 24th of August—July, that there had been campers in there at that cabin down by the water-tank; he didn't see any evidence of fire having gone from the cabin over to the railroad track; if a camper had set fire there, he would not necessarily have set it in the middle of the track, he could set a fire out there any place, he presumes; does not know whether there were any campers there on the 23d, didn't see any up around the cabin on the 11th; he passed right along there immediately ahead of the fire, ahead of the train, on August 11th, and didn't see any sign of anybody anywhere near McRae's cabin at that time, might have seen some one along the track; doesn't remember; made it a point at that time to pay particular attention to campers, and cautioned some people to look out for fire, that was part of his duty, to caution campers against danger from fire.

Whereupon, upon redirect examination, said witness testified as follows:

Thinks it was about one-thirty to two o'clock when he discovered the fire of August 11th; he was just below Detroit on the creek, when he noticed smoke down the creek, and went up to Detroit as fast as he could and got a speeder and went down there; he was behind the regular train.

Whereupon, on recross-examination, said witness testified that when he first noticed the fire the smoke

(Testimony of H. M. Guthrie.)

seemed to be going right straight up; of course, a person far away couldn't tell how big an area was covered over, but it looked to him about the size of a large fir tree top—the black smoke that he saw at the time; that was about three miles from it.

[Testimony of E. Daniels, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called E. DANIELS, who being first duly sworn, testified on direct examination as follows:

Lives at Albany; is conductor on the Corvallis and Eastern; have been running on the train six years last October, as conductor; was employed on the train prior to that time, as brakeman, for five years; have been working on the train about eleven years; his run is Albany to Detroit; remembers about the fire that occurred down below the water-tank there some place, in the neighborhood of Granite Mountain; never knew anything about it until they were a mile or two below there the next day; Mr. Hoover, he believes it was, was talking to a man named Johnson; told him about the fire after he got down the road; that was the first he knew of it; went down on the train from Detroit, on the 23d of July; don't know whether it was just that day or not that he picked up some passengers not far from the water-tank; he had been picking them up and letting them off there the year round; it is a common thing in the summer to get on at that place, fishermen and hunters; don't remember stopping there on this particular day; timber cruisers every few days get off and on up

(Testimony of E. Daniels.)

in there; didn't notice that fire coming down at all on the 23d; if there was any fire on the railroad track as he came down, he would have been likely to have seen it, unless he was busy inside of the coach—he might not have noticed it; never noticed the fire at all as they went up, and as they came down, the two houses there at McRae camp were gone and the whole side of the hill was afire there; that was about two and a half hours after he passed in the morning; never noticed any people about there when they went up, in that neighborhood; Jack Simpson was his engineer; he operated that train during the time he was there, with witness; that is mountainous country up there; at the water-tank there is a good steep grade, north of the track; at McRae's cabin it is flat, flat country down there, back of McRae's cabin is a steep hill, but a flat country where the house stood; the house stood about 15 or 20 feet back from the railroad track, the cook-house did; when they were logging there, people lived there, when Curtis Lumber Company was logging there, they had some people in there, that was their bunk-house; the one on the hill was the dwelling-house; McRae was not living there at any time after he commenced running on the road, that witness knows of; does not know of one of the McRaes having a dwelling-house between the river and the railroad track; train was going about ten or twelve miles an hour going up, that is about as fast as they travel in that country; he had train of four flat cars, two box-cars, and two coaches; one was a baggage-car, and one coach; don't remember

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(Testimony of E. Daniels.)

whether he had many passengers or not; the bridgemen generally rode just about where they wanted to, never paid much attention to them; they got on and rode anywhere; he kept the passengers inside, but never paid much attention whether they rode on the flat cars or not.

Whereupon, on cross-examination, said witness further testified that they sometimes carried their hand-car on a flat car, hardly ever put it in a box car, always carried it on a flat car; eight men in the bridge gang; remembers how many coaches and how many flats he had that day because he looked at the book, has no recollection outside of that; fishermen up there travel all along in there; he has taken them up all the way from the cabin below the water-tank clear to Detroit, any time; the cabins below the water-tank, all times of the year; part of them go clear to Detroit; they fish all times of the year up there; that fire might have been there when he passed, but he didn't see it; Hoover got on the train at Detroit; Hoover could not see fire if it had not been there; witness was busy and never looked up; in going on on the 11th of August, he saw no fire at the cabin, never noticed any until they got right opposite, going back; did not hear Simpson and the fireman talking about it; he wasn't up near the engine; didn't eat lunch the same place they did; he boarded at a hotel; didn't see them before he got on the train; his attention was not called to a great big fire down there; they got back in about two hours, went back there about half-past one, and went up at eleven thirty;

(Testimony of E. Daniels.)

never looked out to see anybody along the track; does not know what precautions the men out on the flat cars took to keep their clothes from burning up; never went out to see what they put on; the engines were not throwing sparks generally, to his knowledge; did not talk to Huddleson about it; never told Huddleson he was afraid it would burn the train up some day, he is sure of that; does not remember of a load of logs getting afire one day when he came down, does not recall that; that was a load of wood they had to run under the water-tank to put out, it was afire when they got there; couldn't say how long that was after the fire of August 11th.

Whereupon upon redirect examination said witness testified that he never was at Volcani Creek, and doesn't know how far it is from McRae's claim; that is about the place people get off to go over to Blowout Creek; that is quite a fishing stream.

[Testimony of P. Bressler for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called P. BRESSLER, who being first duly sworn on direct examination testified as follows:

Lives in Detroit; was down near the water-tank during the fires of July 23d and 24th; was there when Mr. Stevens got there; nobody there when he got on the ground, no one else came until Mr. Stevens came, and haven't any recollection of anybody coming after that until the bridge gang came; the forest man was there about four o'clock, he thinks

(Testimony of P. Bressler.)

Stevens got there first, before the forest man; the burn was only on one side of the railroad when witness got there, later it got on the other side and burned perhaps about 150 feet towards the bridge and drift; on the north side of the railroad track it was a very narrow strip not over two or three rods wide, and run to a point up to where the bridge was; they were engaged in fighting the fire to keep it from the bridge; cinders flew from the snag on the other side of the track, over the river, next the track, in his opinion, saw cinders flying, but didn't see them fall; this burned after the fire had burned on the other side, and it cut over on the opposite side of the track; saw cinders there, and saw fire flying everywhere; he and his men fought 36 hours trying to keep the fire away from the bridge; knows about the fire of August 11th, he discovered that just after the train left Detroit about one thirty, he was in Detroit; he put his hand-car on and went there as soon as he could—as far as he could get for the fire; the fire spread over three or four hundred acres, maybe more, when he got there; that section of the country was all logged timber at that time, it had been logged off within the last eight years; they hadn't logged on any of that ground for five or six years, can't give the dates it was logged, exactly; knows the point exactly where they claim the fire of July 23d started; the country there is a very steep hillside; right close to the tracks the rocks is pretty near perpendicular for a short distance; does not run up in the air very high, it don't run perhaps

(Testimony of P. Bressler.)

any higher than over, that is, right close to the track, back from there it runs up at half pitch; a high mountain; had not been logged over; down along next to the track, it had vegetation growing on it, vegetation will grow wherever there is dirt, but along right in the center of the track and between the ties it is rock ballast, broken rock, very little vegetation in that; on the side of the track there was fern, green fern; fern is always green unless it stands on a very rocky point; he never cut any fern until in August; thinks he cut a little in July, has no recollection whether he commenced in July or not; had not cut down in this neighborhood; did not cut any in August, about the 11th, about McRae's place, that he recollects, first cutting is generally up towards Detroit; quite a flat between Detroit and Berry and down below Berry some distance, he generally commenced at one end and worked right through; heard some of the testimony about dry fern laying around there; dry fern—fern that grows this year would be dry next year, and it will lay on the ground for at least two years; blackberry vines will become dry and lay there for two years, of course the ground is covered with them; they were all along the side of the track, some; not on the track much; those that grow on the track will be green in the summer time; there were some green fern—some blackberry vines, along the track at McRae's cabin; not thick in the track, or at the end of the ties, not more than that high; (illustrating) green; some boards piled up there; the Curtis people had torn down their bunk-

(Testimony of P. Bressler.)

house, they had piled this lumber up, perhaps five or six hundred feet, had piled it up within a foot of the ties, with the intention of loading it on the cars to haul away; that was piled up when the fire was there, and burned up; that was the bunk-house; there was another house, further back, that had been used for a cook-house; that was, he should judge, about 25 to 30 feet back; he never measured it, could not say the exact distance.

Whereupon on cross-examination the witness further testified that he never noticed whether a tie had been afire there, where they claim the fire was, never noticed charred tie, there are lots of charred ties, some burned up, some ties burned out there along the railroad, and more charred ties than he could watch, than he could keep track of; paid no more attention to that part of the track than any other, ties there are as good as the other end, no rotten ties in that track; if he found a rotten tie, he would take it right out, that is his business; finds the rotten ties as soon as he can get around to them; had been down as far as the water-tank that season, there were rotten ties in there, there is yet, can't take them all out at once; has five or six men helping him; when he cuts down that fern he lets it lay there, and sometimes it lays there year after year until it rots; sometimes he burns some of it up, in the worst places, when he can; he has fairly good sized territory to look after; there was but very little dirt and dead brush and fern and stuff within 20

(Testimony of P. Bressler.)

feet of the track; at McRae's cabin the vegetation was closer, but not brush, no brush there, there was some dry fern and dry grass, and in some places it came right up to just a few feet of the track; it took him less than half an hour to get down from Detroit to the place of the fire, and the fire, by this time, had spread over two or three or four hundred acres; it was a great big hot fire, couldn't get within a mile and a half of it, of McRae's cabin while the fire was burning up through that country.

[Testimony of T. H. Paine, for Defendant.]

Whereupon the defendant, to further support the issues in its behalf, called T. H. PAINE, who being first duly sworn on direct examination testified as follows:

Lives at Mill City; have lived there twenty years; he is a lumberman; worked for the Curtis Lumber Company, then in the country below there for himself—well, connected with Gooch; in 1906 lived right on the track, close to the track, working right on the track ever since he has been up there; never worked above Mill City; in July and August, 1906, he was tallying in the Curtis Company's yard; this is quite an extensive yard, there is a good deal of business down there with the railroad company; passing from there out, going east, there is quite a heavy grade, not as much as one and a half; out of the river track and also out of the mill track; thinks the mill track is a little heavier, that would be right alongside the sheds between the kilns; never saw any sparks emitted from engines passing along past his place in

(Testimony of T. H. Paine.)

July and August; never since he lived up there, saw any sign of any fire that any of these engines ever set or ever put out; around the mill yard is the worst kind of a place for dry material, sawdust, shavings and accumulation of trash and so forth, more call for power from the engine there than most any other place along the line, also out of the yard and going up the grade out of town, going west, both ways; thinks the grade going west right out of Mill City is about as heavy a grade as there is on the line—on that division; have been there and engaged in that business for a long while; was with the Santiam Company; also with the Curtis Company.

Whereupon on cross-examination said witness further testified as follows:

He was tallyman for the Curtis Lumber Company, and as such it was his duty to stand out and watch the trains go by; he never saw a spark thrown out while watching them; he watches in the daytime, not at night; if he saw any sparks, it would have been his duty to put them out, he was looking out for anything of that sort, but never had occasion to put any out; those engines never put any fire out when they passed him; never saw a live spark; you couldn't tell in the daytime whether alive or not; he has been around there when they were working as hard as they could to get out that line; they keep their lumber just as near the track as possible for the trains to get through, dry and green both; the yard wasn't very clean in lots of places; it was not his business to see that it was kept clean, so as to minimize the

(Testimony of T. H. Paine.)

danger, there was a man there to do that, but there was always an accumulation; they didn't have their consumer at that time, and sawdust flying all the time from the sawdust pit, across the river, had accumulated on top of the lumber and the trams and ground everywhere; after they got their consumer that stopped to a certain extent; witness was loading cars—overseeing a gang of men loading cars; the Curtis people had men to protect the lumber from fire and keep the place clean so as not to catch fire, that wasn't his business, he was loading cars; they had a crew of men sweeping all the time; the Curtis Lumber Company is and has always been managed by part of the Shaw family, since he has been there; the Shaw people were not managing the Corvallis & Eastern about that time; Mr. Shaw, he thinks, was secretary of the company, but as far as he knows, he had nothing to do with the management.

[Testimony of T. H. Sherrard, for Defendant (Recalled).]

Whereupon the defendant, to further support the issues in its behalf, recalled T. H. SHERRARD, for further cross-examination, who further testified as follows:

He has examined the records since being on the stand yesterday, and finds that he was only partially correct in his statement as to land included in the timber sale about to be made by the Government, which he mentioned yesterday; the sale is to be made on two areas, two separate areas; twenty-five acres was at the point that he specified, and fifty acres in

(Testimony of T. H. Sherrard.)

sections 6 and 7; the part in sections 6 and 7 is the southeast quarter of the southwest quarter of section 6, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 7—ten acres; the other 25 acres is in the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 17, northwest of southwest; that in sections 6 and 7 is not the area where the claims are made.

[Testimony of H. G. Hayes, for Plaintiff (in Rebuttal).]

Whereupon the defendant rested its case, and the plaintiff, to further support the issues in its behalf, called H. G. HAYES in rebuttal, who having been duly sworn, was interrogated and testified as follows:

Q. I have forgotten what you said you were doing, Mr. Hayes at the present time.

A. I am in Eugene in the general hardware and grocery and furniture.

Q. I will ask you whether or not you in the winter of 1906 and 1907, had a conversation with Robert A. Shaw, you and he being on the train going from Detroit to Albany, sitting together in a seat in a coach upon that train, in which he said to you that he paid more than a dollar per thousand for timber upon what is known as the Hansen claim, I believe—what claim is that?

A. It was the Maier's claim.

Q. Oh, yes, Maiers, Kriesel and Carlton.

It is hereby certified that proper foundation was laid for said impeaching question.

To which counsel for defendant objected for the

(Testimony of H. G. Hayes.)

reason that this witness has testified upon that subject and has given the conversation, and that the same is incompetent, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered and was further interrogated on that subject as follows:

A. Yes, sir, I say he did. He did not tell me what he paid for the claim, but he told me he paid over a dollar a thousand—that those claims cost him over a dollar per thousand.

Whereupon said witness further testified that he can't tell exactly when they were sold, Mr. Hoover could tell exactly, but they were sold—the Curtis Lumber Company bought them shortly before they went down on the train; witness and his wife were going down on the train, and Mr. Shaw came to them, sat down and had a conversation.

Whereupon said witness was further interrogated and testified as follows:

Q. Do you know Al Mulkey?

A. Yes, sir, I do.

Q. Did you have a conversation with Mulkey in Detroit, Oregon, about a month or six weeks after the fire on the 11th day of August, relative to this fire—

A. I can't get—

Q. Wait until I get through. At the front of the Curtis Lumber Company's store in Detroit, you and he only being there present, in which he said that he passed up the track a few minutes after the train going east had passed along on that 11th day of Au-

gust and that he saw a fire there in the roof of the bunk-house, or whatever it is called, and that he could have put it out if he had had a little help or had even had a shovel to throw some dirt upon it, or words to that effect?

It is hereby certified that a proper foundation was laid for said impeaching question.

To which counsel for defendant objected as incompetent, irrelevant, and not redirect examination, and that it is an attempt to impeach a witness on an immaterial matter; which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

A. Yes. Is it necessary that I tell the conversation or any more than just answer?

Q. No, I think that is all.

Whereupon on cross-examination said witness further testified that he and Shaw talked of the timber business generally, as they were both in the same business; witness was in the Forest service; he was not engaged in buying and selling timber, but was supposed to know the conditions; Shaw didn't come to him and state that he had paid more than a dollar per thousand for this claim; he came to him and spoke to him, and witness asked him to sit down and talk, and they mentioned the fact of the Hoover Lumber Company buying the Hansen claim, and Shaw said that he and John Ross, their logging foreman, came up and went over the Hansen claim, but they didn't consider it worth the money. "Well,"

(Testimony of H. G. Hayes.)

said witness, "you got the Maier and those claims up there just recently," and he said, "Yes, we did"; and they talked on and Shaw asked witness if he knew what Hoover paid for the Hansen claim; witness said he didn't at that time, and said, "You have got better claims up there"; and the conversation went on and witness made a remark something like, "Your timber up there is worth more if you don't intend to log it soon, than Hansen's claim down there on account of fire, it is on the opposite side of the river and does not lay exposed to fire and sun, you can afford to pay more for it than he has"; Shaw said, "It cost us better than a dollar a thousand; we consider we got them claims cheap"; that may not be word for word, but that is substance of the conversation. Witness remembers the substance of the conversation, that is very nearly correct, that is substantially what Shaw said, he wants the jury to understand, he used that language; witness had been acquainted with Mr. Shaw before that; never sold him any timber; witness used to go up in there on his vacations before he was employed in the Forest service, the first trip he went in there he met Shaw and his father, he considers he is quite well acquainted with them; he has worked in the mill business; Shaw came to Albany with him on the occasion spoken of; thinks he and Shaw talked about half an hour together, on the train; Shaw's wife was with him; thinks Shaw said that they considered the Hansen claim about four million; Shaw first asked him what he considered this claim, he said he didn't

(Testimony of H. G. Hayes.)

know exactly, but would say somewhere near seven or eight million, and Shaw said that when he and Ross went over it they estimated it at about 4,000,000; he did not say he had paid more than a dollar a thousand, buying it on the 4,000,000 basis; he didn't buy that at all; he didn't prove the other claims, their professional cruiser cruised generally other claims; Shaw did not cruise these claims he bought there, they bought them from some professional *cruise*, they bought them very suddenly; had the conversation referred to with Shaw coming down on the train after they had bought the claims, it was in the winter of 1906, but is not positive of the date; Shaw did not tell him what they paid for the claim, in dollars and cents; witness did not tell Shaw how many million feet on the claims they bought, and Shaw didn't tell him; they cruise a good many claims and don't buy them; they had a cruise of these by their professional cruiser, and when they saw it was the proper time to buy, some one else apt to get them, they bought them; they have a correct cruise of them; he didn't tell witness all this; witness is not guessing the conversation he had with Mulkey in front of the store there in Detroit; Mulkey spoke of the fire that had happened; can't remember who spoke about it first, whether he or Mulkey; they spoke of this fire, and he spoke of the unfortunate condition; they had fire all around, and lots of it; don't know whether he mentioned to him first of going by there; he asked him if he had worked on the fire; at any rate, Mulkey said he came up by there and could have put the fire out had he had any

(Testimony of H. G. Hayes.)

help, he said it was very small—compared it to his hat; don't know where Mulkey had been, but thinks he had been out, he had sold a timber claim about that time, and thinks he had been out and was coming back; he didn't say so; can't tell what day of the week or month he had this conversation with Mulkey; it was near noon—train time; can't say the train was there, but he would come there for his mail about the time the train came in; possibly half a dozen people were in sight about the platform when this conversation took place, but he couldn't tell who they were; they were not engaged in the conversation; no one engaged in it besides Mulkey and witness; did not talk to any other man at this time about this conversation; stayed where Mulkey was about ten minutes; possibly he spoke to a dozen people on this occasion; he asked the postmaster for his mail; couldn't say whether he got any mail this time.

Whereupon plaintiff rested its case, and the foregoing was all of the testimony offered or admitted on behalf of either party.

Whereupon the Court, after argument of counsel, instructed the jury as follows:

[Instructions, Exceptions Thereto, etc.]

GENTLEMEN OF THE JURY:

This action is brought by the Government against the Corvallis and Eastern Railroad Company to recover damages which it alleges it has suffered by reason of the negligence and carelessness of the railroad company in creating a fire along or on its right

of way, which ultimately spread into the woods and killed the timber belonging to this plaintiff. It is charged in the complaint that the defendant railroad company is negligent in two particulars. First, it is said that it negligently and carelessly suffered and permitted inflammable and combustible material to accumulate along its right of way through this Forest Reserve, and that a fire communicated from one of the railroad company's engines into the inflammable and combustible material which it had negligently and carelessly permitted to remain or accumulate on its right of way, and from there spread into the forest and killed this timber. In the second place, it is charged that the company was negligent and careless in equipping its engines, or equipping the engine which it used upon its road along and through this Forest Reserve. And, in that connection it is charged that it failed and neglected to equip this engine with suitable and proper appliances to prevent the escape of fire and sparks, and for that reason the fire was communicated to this forest, and the trees destroyed. Now, these are the two grounds of negligence charged in this complaint. There are two causes of action. They are both, however, based upon the same charges of negligence. They refer to fires occurring at different times. The first is based upon a fire alleged to have occurred about the 23d day of July, 1906, and in that cause of action it is stated and claimed by the Government that 200,000 feet of timber was destroyed, of the reasonable value of \$100, and that the Government was put to cost and expense in extinguishing the fire and preventing its

spread into other timber of about \$717.79, making a total claim, under the first cause of action, of \$817.79, as I figure it from the testimony. You, of course, have heard the testimony upon this question, and are not to take my statement for it as true; upon the testimony, I am as likely to be mistaken as anyone else, and I only give this as my impression and according to memorandums taken during the trial. The other cause of action is based upon the fire alleged to have occurred on the 11th of August, 1906, and in that cause of action the Government claims damages in the sum of \$9,880.90, which includes the alleged value of the timber destroyed, or the timber alleged to have been destroyed and cost and expenses incurred by the Government in extinguishing the fire and preventing its spread.

Now, these two statements include the causes of action alleged in this complaint, and you will notice from the statements I have made that the right of recovery here is based upon the charge of negligence, first, in allowing inflammable material to accumulate along the right of way, and second, in operating over its road engines that were supplied with defective appliances for arresting sparks and preventing the escape of fire.

The defendant, by its answer, denies the negligence charged in the complaint, and this creates the issues that have been tried here, and the issues for you to determine from the testimony.

The first question of importance, and indeed, the controlling question so far as the outset of the case is concerned, will be for you to determine whether

the fire which destroyed this timber was caused by sparks or fire escaping from the defendant's engines. The answer of the defendant denies that it was responsible for the fire, or that it occurred by reason of sparks or cinders or coals escaping from its engines. That, I say, is the first question for you to determine from this testimony. Of course, if the fire was not caused by the defendant's engines, but from some other source, or for some other reason, or by some other individual or individuals, then the defendant will not be responsible for damages that occurred by reason of the fire. So that the first question for the jury to determine from this testimony will be whether or not this fire was caused by coals, or fire, or sparks escaping from this Company's engines. Now, upon that question, you will remember that no witness has appeared upon the witness-stand who has testified directly to that effect. That is, no witness has testified, as I remember, to having seen this fire start from some coal or spark that was emitted from its engines, but they have testified to circumstances under which the fire was discovered, the time it was discovered, the condition of the surroundings at the time, and from that the Government draws the conclusion that the fire originated or was started by the defendant company. Now, the rule of law is that where a fire is discovered on or along a right of way of a railroad company about the time or soon after the passage of a train, and there is no other probable explanation of its origin, the jury would be justified in inferring or believing that it was started by sparks or fires from the engine, and

so, in this case, if you believe these fires, or either or both of them, were discovered along this right of way soon after the passage of one of the trains of this defendant company, and there is no other reasonable explanation appearing from the testimony as to the origin of the fire, then you would be justified, I think, in believing, as a matter of fact, that the fire was caused by sparks, cinders or coals from the engine. That is a question for you to determine from the testimony, and you can determine it from the testimony as it appears to you, and as you understand it.

Now, then, if you find that the fire was caused by sparks, or cinders or coals from the engine, then it will be necessary for you to proceed or examine the question as to whether the company was negligent in allowing these sparks or coals to escape from the engine, or in the manner in which it kept its right of way along about where these fires started, for, as I said a moment ago, there can be no recovery in this case unless the defendant company was negligent. The Government is the plaintiff in this case. It is entitled to recovery, if it has been damaged, just the same as any private individual would be, and it stands before this court and jury in this action in the same attitude as a private individual, and its rights are to be determined in exactly that same way.

A railroad company, in operating its road, has a right to operate its engines by using fire and steam, but in doing so, the duty devolves upon it to exercise reasonable care to so operate them as to do as little damage as practicable to property along and adja-

cent to its right of way on account of the escape of fire from its engines. It is also the duty of the railroad company to exercise reasonable care in obtaining and equipping the engines used by it upon its road, with the most approved appliances to prevent the escape of fire, and to keep such appliances, or to exercise reasonable care to keep such appliances in good repair; and, when operating engines, to provide skillful and competent servants to operate the same.

It is also its duty to exercise reasonable care and prudence to prevent the accumulation of combustible and inflammable matter upon its right of way to such an extent that fire escaping from locomotives will not be dangerous to the property adjacent thereto. And it is also its duty to remove all such matter from its right of way and to exercise reasonable and ordinary care to keep the same free therefrom, and its failure to observe the care as above stated, in any of these respects, when damage results therefrom, by sparks emitted from its engines, renders it liable to the extent of such damage to the party injured.

If you should believe from the testimony in this case that at the time alleged in the complaint the defendant had negligently allowed inflammable and combustible material to accumulate on its right of way in the vicinity or at the places at which the fires complained of in the complaint herein are shown to have started, and that a fire started at such place or places soon after the passing of a train of the defendant company, and spread and destroyed property of the plaintiff as alleged, and it is shown to

your satisfaction that such fire did not probably result from any other cause, you will be justified in finding that it was set by sparks from the engine of the defendant.

If you find that the fires or either of them were caused by sparks or cinders emitted from a locomotive of the defendant company, and that damages resulted to the plaintiff as alleged in the complaint, a presumption of negligence arises against the defendant in the construction, management and care of its engines, and unless such presumption is rebutted or overcome by evidence upon the part of the defendant, showing to your satisfaction that the engine of the defendant at the time of the fire was properly constructed, and that the defendant had exercised ordinary and reasonable care to provide and put into use approved appliances for arresting sparks and cinders and the escape of fire, and that the engine was carefully operated with skillful and competent employees, and was in good repair, it will be your duty to find for the plaintiff in such sum as it may be shown to have been damaged.

It is not incumbent, however, upon the plaintiff in this case to show that the defendant was negligent in all of the respects charged in the complaint. It need only show that the railroad company was negligent in any one of the respects set forth in the complaint; that is, that it was negligent either in allowing inflammable or combustible material to accumulate along its right of way, or that it was negligent in operating engines over and along this road through this forest, that were not equipped or properly

equipped, with safety appliances to prevent the issue of sparks, or cinders, or coals; or that it had not exercised reasonable or ordinary care to provide such appliances and to keep them in proper repair.

If you find that the fires alleged in the complaint were started from sparks or cinders emitted from a locomotive of the defendant, which ignited inflammable material negligently permitted by the railroad company to accumulate on its track and right of way and spreading therefrom, to have destroyed the property of the plaintiff, the railroad company will be liable for the damage resulting therefrom, even though it is shown that the engine emitting the fire was faultless in construction, perfect in the appliances for the arresting of sparks, in good repair and skillfully and carefully operated. That is, if the railroad company was negligent and careless in allowing inflammable and combustible material to accumulate along its right of way, and fire from one of its engines was communicated to this inflammable or combustible material on the right of way, and spread from there into the forest, and damaged the plaintiff, the company would be liable, although it might appear that its engines were in good repair, because the negligence in that instance would consist of the fact that it had failed and neglected to remove the inflammable and combustible material from its right of way. If, however, you should find that the track and right of way were free and clear of inflammable material, but that the locomotive of the defendant emitted large quantities of sparks, cinders and fire which ignited material upon the

right of way or adjacent thereto, and spread therefrom and destroyed the property of the plaintiff, and that such sparks, cinders and fire were emitted by reason of the negligence and carelessness of the defendant in failing to have its locomotive in good repair, or in failing to equip the same with the most approved appliances for arresting sparks, cinders and fire, or by reason of unskillful or incompetent employees handling its locomotive the defendant would be liable, and in such event, it would be your duty to find for the plaintiff. That is, if it should appear that the company had not been negligent in the matter of allowing inflammable or combustible material to accumulate along its right of way, but that it was negligent and careless in failing and neglecting to equip its engines with proper appliances to prevent the issue of sparks, and by reason of that fact fire escaped from this engine and communicated to the material along or near the right of way, and from there spread into the forest, it would be liable in that instance because of its negligence in the manner of equipping its engines. And this only comes back to the question I stated in the outset that there were two grounds of negligence in this case.

It is sufficient to establish a *prima facie* case upon the part of the plaintiff for it to show that fire has been communicated from an engine of the defendant to its property, resulting in the damage or destruction thereof, and that such proof raises a presumption of negligence in the construction and management of the engine, and that same was out of repair

and cast upon the defendant the burden of rebutting and overcoming such presumption by competent and satisfactory evidence. In overcoming this presumption, it is the duty of the defendant company to satisfy you that the locomotive was properly handled or operated, and that due care and caution had been exercised in its construction and equipment, and in keeping it in repair so as to prevent the emission of sparks and fire, so far as that end could be attained by reasonable care, without impairing the efficiency of the locomotive.

If there were no defects in the spark-arrester or other appliances, or in the ash-pan, or other appliances used by the defendant in the engine claimed to have caused the fire, or if the defendant had exercised reasonable care to keep its appliances in reasonably good condition so as to prevent the issue of live cinders, or coals while the engine was being operated, and the engine was operated with ordinary care and skill under all circumstances, and the right of way was kept and left in reasonably safe condition as to inflammable material, and notwithstanding all this, fire occurred and communicated to the property of the plaintiff, the defendant would not be liable. And again, if it appears from the testimony that the employees of the defendant engaged in operating its engine and train at or about the time the fire occurred, acted, under the attending and surrounding circumstances, as reasonably prudent and careful persons having due regard to the rights of others, would have acted under the same circumstances, then the defendant could not be held care-

less or negligent in operating the train or engine. If the defendant actually used on the engine drawing the train on each of the dates when these respective fires are said to have started, the most approved appliances for the purpose of preventing sparks or fire from escaping, and such appliances were kept in good repair and condition, and the defendant exercised reasonable care and diligence in the use of these appliances, and in the care of the right of way as to inflammable material, at the respective times, then the defendant was not negligent in that respect. All the law required of the defendant is the exercise of ordinary and reasonable care, such care as an ordinary, reasonable person, engaged in that business, and under all the circumstances, would have exercised, and if it does that, then it has discharged all the duties the law can impose upon it. It is not an insurer. It does not guarantee, nor is it required to guarantee that no fire will issue from the engine, or no sparks will issue from the engine, but it is required to exercise reasonable care to keep its right of way free from inflammable material, so that fires that naturally drop from the engine will not communicate to the adjacent property, and it is also required to exercise reasonable and ordinary care to provide its engines with the latest approved appliances to prevent the escape of sparks and fire, and to keep such appliances in repair, and to provide skillful and competent servants to operate its engines, and to see that they operate them in a skillful and proper manner, so that fire will not escape. When it has done all this, then it has discharged the

duties the law imposes upon it, and it would not be liable, but if it fails to do so, then it is liable for the consequences of its negligence, and therefore if either of these fires was communicated from the engine of the defendant, but from the preponderance of the evidence you believe that it exercised the care and diligence that I have pointed out to you in the matter of equipment and repair of its engines, and appliances intended to prevent the escape of sparks, cinders and coals, and that the employees exercised reasonable and ordinary care in the operation of its engine, and in the care of its right of way, then, even though you do not find that the fire was caused by the engine of the defendant, under such circumstances it would not be liable, because it would not be negligent.

If it should appear from the testimony and you should believe that the defendant allowed inflammable and combustible material to accumulate on its right of way, and that a fire was discovered in such material soon after the passing of a train, you would be justified in inferring that such fire was started by sparks from the engine of the defendant drawing the train, unless facts are shown by the defendant rebutting such inference to your satisfaction. In this connection, I instruct you that you are entitled to consider the evidence that at various times shortly before or after the fire alleged in the complaint, some of the defendant's locomotives scattered fire at or near the same point, in determining whether or not the defendant's engine or engines set the fires, or either of them, complained of by the plaintiff.

The mere fact that just prior or subsequent to, or about the time of the fire, or at any time testified to by witnesses, the engines scattered sparks, is not, of itself, sufficient to impute negligence to the defendant, because it is practically conceded that an engine properly equipped will, under some circumstances emit sparks of some character. It is only when it appears that sparks are emitted in unusual quantities or of unusual size, that there would be any presumption of negligence in the construction, repair or operation of the spark-arrester, or other appliances used by the defendant.

And then again, if it should appear that the defendant company was negligent in permitting or allowing inflammable material to accumulate along its right of way, and that it was not negligent in the other respects pointed out in the complaint, and to which I have called your attention, it would of course be necessary before you could find it liable for the injury alleged in this case, that the fire originated in this inflammable material and on this right of way. In other words, if the company allowed inflammable and combustible material to accumulate on its right of way, and the fire started somewhere else, not in that material, and it was not the cause of the injury, then, while it might be negligent, it was not the negligence causing injury to the plaintiff in this case, and the plaintiff would not be entitled to recover on that account. If therefore you are satisfied that the fires, or either of them, complained of by the plaintiff, were set or ignited by the locomotives of the defendant, by reason of the fact that the

defendant carelessly or negligently allowed combustible or inflammable material to accumulate upon its right of way, and failed to remove the same therefrom, and keep the same free, or carelessly or negligently failed to equip its locomotives with the most approved appliances to prevent the issue of fire, cinders or sparks, or negligently or carelessly failed to keep the same in repair, or negligently or carelessly handled or operated the same, or carelessly or negligently failed to provide skillful and competent employees or servants, and by reason of these negligent actions to which I have alluded, this fire was allowed to escape or did escape from the engines, communicating to material along or about the right of way, and from there into the timber belonging to the plaintiff, the defendant would be liable in this case.

There has been introduced in evidence a plat or map of the right of way of this defendant company, filed in the Land Office, the date I do not now recall, but it is conceded, I believe, to have been prior to the time of these alleged fires, and by this map, and under the Act of Congress under which it was filed, the company acquired a right of way 200 feet wide, or 100 feet on either side of the center line, through the public domain, and this I believe is considered to be public lands at the time of the location of this road. It is also in evidence, and is a matter of which the court will take judicial knowledge, that the land claimed by the Government in this case to have been damaged by these fires, is within a Forest Reserve so created by proclamation of the President of date

September 28, 1893, or some several years before the fires alleged in this complaint occurred.

Now, again, under the rules, as I have given them to you, if you should find the defendant company was negligent and that by reason of its negligence this fire was communicated to the property of the Government, it will then be necessary for you to determine the amount of damages to which the Government is entitled. You will remember from the testimony that it appears, or is claimed by plaintiff that about 200,000 feet of standing timber, green timber, was destroyed by the fire of July 23d, or as it is denominated, the Granite Mountain fire, and that about between eleven and 12 million feet is alleged to have been destroyed by the fire of August 11th. It is charged in the complaint that the timber destroyed by the fire of July 23d was worth fifty cents per thousand feet, or one hundred dollars. And it is also charged that of the timber destroyed or alleged to have been destroyed by the fire of August 11th, a portion of it—I do not now recall the exact amount, but you will be able to ascertain it from the complaint—was worth fifty cents per thousand, and a portion of it was worth \$1.25 per thousand. Now, the only witness, I believe, who testified on the stand as to the quantity of timber destroyed or damaged by these fires, was Mr. Cahoon—I think I am right about that. I may be mistaken, but I think he was the only witness who undertook to testify as to the number of feet of timber destroyed by these fires. If I remember the testimony correctly, he said 200,000 feet within the Granite Mountain fire, or the

fire of July 23d; and there was 8,297,220 feet of what he called second grade fir destroyed by the fire of August 11th, and 3,422,230 feet of what he called first grade fir destroyed in the fire of August 11th. For the second grade fir as it is denominated here, the Government asks fifty cents per thousand, and for the first grade \$1.25. And whatever you might conclude from the testimony to be the value of this timber—I mean the damage suffered by the Government on account of the destruction of this timber—you could, under no circumstances, allow more than fifty cents per thousand for what is classed second grade, and \$1.25 per thousand for the first grade, because that is all the Government asks in the complaint.

The measure of damages in this case is the difference, if any, between the value of this timber immediately before the fire, and immediately after. I think it probably can be assumed from the way the case has been tried, and from the record in this case, that the value of this property consisted in the timber, and that the land, without the timber, is of no special value, at least the evidence has all been directed to show the amount of timber destroyed, and its value. Of course the land belongs to the Government of the United States, and there is no law, I believe, under which it could be disposed of, but there is a law authorizing the sale of timber from Government reserves under certain conditions and restrictions, and therefore, in arriving at the damages, if any, sustained by the plaintiff, it will be your duty to take into consideration the market

value of the timber both burned and unburned upon the land immediately before and immediately after the fire, and the difference between such market values, if any, will be the damage sustained by the plaintiff to this land and the timber thereon. You are authorized in arriving at this conclusion to take into consideration the location of the land and the timber, its accessibility to market, and the transportation facilities, the quality of the timber, the effect of the burned timber upon the value of the other timber, adjacent to or surrounded by it, together with all the other evidence in the case. To the sum which you may find to be the damage, the plaintiff is entitled to recover on account of the destruction of this timber, you will add the amount that it expended, or the amount the testimony shows that it expended in fighting these fires and in preventing them from spreading into other and adjoining timber, and to this latter item, you will be justified in adding interest at six per cent, or the legal rate.

Now, in this, as in all cases, it is the duty of a party to reduce his damages as much as can reasonably be done under the circumstances, and therefore, if you believe from the testimony that after this timber had been burned, it could have been disposed of by the Government officials for any sum—according to what sum it could have been disposed of, if it had an opportunity to sell it—it was, I think, its duty to have done so and thus reduced the damages, but in determining that question, and in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of

this timber; whether they had an opportunity to sell it; whether they could have disposed of it, and all the circumstances that surrounded the location and condition of this particular timber now in controversy. If these people could have sold this timber—if there was a market for it, and they could have sold it and gotten something for it—it was their duty to do so, and reduce the damages. If, on the other hand, they could not sell it, there was no market for it, and no opportunity to sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire.

I do not understand that one can negligently and carelessly cause a fire in a timber claim belonging to another, and then respond in damages to the full extent that the other suffered by reason of that fact because the timber would, from a speculative standpoint, be worth more money. Whether it is worth anything or not, is of course dependent upon the market. After the timber is killed, the testimony in this case shows it will decay, and it will decay in a certain length of time. Now, if during that time, before it decayed, there was no market for the timber, no opportunity to sell it, no means by which a man could get any money out of it, the fact that it may have a speculative market value ought not, it seems to me to be a reason why the damages should be reduced, provided the owner of the property exercised reasonable care and diligence and effort to dispose of the property and reduce the damages to the smallest possible extent, and in that view you have

a right to consider this question as it appears from the testimony in this case.

Now, I think, gentlemen, I have stated to you all the particular rules of law that apply in this case, or that will be necessary for you to consider in arriving at your verdict.

You are the exclusive judges of all questions of fact. If at any time during the progress of the trial the Court has indicated or estimated its views as to any question of fact, or as to what a witness testified to, you are to disregard it, and find the facts according to the testimony as you understand it, and according to the testimony of the witnesses as you remember it. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which a witness testifies, or by his appearance upon the witness-stand; you are not bound to find your verdict in conformity with the testimony of the greater number of witnesses against a lesser number, but you must find it according to the reasonable preponderance of the testimony as you understand it, and in doing so, you will apply to the testimony given in this case, your own experience, your own judgment. You, of course, are not entitled to find a verdict based upon matters outside of what was testified to on the trial, but you do have a right, and it is your duty, in weighing the testimony, to weigh it by your own common experience in life, and to give it such weight as within your intelligence and understanding you think it is entitled to.

Mr. FENTON.—I think it but fair to your Honor,

to call your Honor's attention to the instructions that my Brother McCourt asked your Honor to give and which your Honor gave on the subject of damages, where I think your Honor used this expression. "And the effect of the burned timber upon the value of the other timber adjacent to it," in the last instruction. I think that is not pleaded, your Honor, and although my Brother McCourt insists upon it, I think I should call the attention of the Court to it at this time.

Mr. McCOURT.—I don't remember that your Honor gave it. I was going to except because you didn't.

COURT.—Gentlemen, these instructions were submitted by the counsel, and it may be that in reading them, I read more than I intended to. My attention has been called by Mr. Fenton to the fact that in instructing as to the measure of damages, I said you might take into consideration the effect the burned timber would have upon the other timber standing adjacent. I did not intend to give that instruction. The question for you to determine is the injury to the timber that was destroyed.

Mr. FENTON.—Then another matter—I am not clear in my own mind what the record is and believe the evidence shows that this fire, if it originated from defendant's engine—the fire of August 11th—it originated in the McRae claim.

Mr. McCOURT.—You attempted to show that, I don't know where it originated.

Mr. FENTON.—The jury have to pass on it. Your Honor said that it was conceded that the filing

of this map and application under the Act of March 3, 1875, gives 200 feet right of way over this country. Your Honor will recall Mr. Weatherford did not admit the company did have any right of way in the McRae claim, not in actual use, because the proof here shows he was in possession before the survey.

COURT.—There is no evidence to show that he was in possession.

Mr. FENTON.—Under that state of facts, we want it to be understood that the Government had shown title over the McRae claim.

COURT.—My understanding of the record was that the railroad company's map of location was filed at the time when the record here shows this land all public land, and unsurveyed land, and that there is no evidence to show that McRae's settlement was prior to that time.

Mr. FENTON.—Under the Act of Congress, the company has the right, within twelve months after the survey, to file a right of way map. I do not want to be understood as consenting to that statement.

COURT.—You can save your exception.

Mr. FENTON.—I want to except to the instruction that they may consider and allow interest, as a measure of damages. I also wish to except to each instruction requested by the defendant and not given by the Court, particularly on the subject of damages.

COURT.—You understand the instructions with reference to interest were that they might allow it on money paid out.

Mr. FENTON.—I did not so understand.

COURT.—I confined it to interest on money that the Government paid out to prevent the spread of fire. I don't think they would be entitled to interest on damages.

Mr. McCOURT.—For the purpose of preserving the record, I wish to except, on behalf of the Government, to that portion of plaintiff's instruction refused in relation to damages, where the Court refused to instruct the jury that they might consider the influence or effect that it had on other timber adjacent and surrounding.

I also wish, for the purpose of the record, to except to the Court's refusal to give the interest instructions requested.

Also to the defendant's instructions that the Court gave in regard to sparks of unusual size. I don't remember just the language of it. I wish to call the Court's attention to the fact that they did not take into consideration the accumulation of inflammable stuff upon the right of way, and I think that should have accompanied the balance of the instruction. It left it as though the throwing of sparks would not be negligent, even if the right of way was dirty. However, I think the jury will understand that from the balance.

COURT.—I intended to make it clear to the jury that there were two counts of negligence charged in this case. One was inflammable material on the right of way, and if there was inflammable and combustible material on the right of way, and fire communicated to it from the defendant's engines, and by reason of that fact, it escaped into the timber, the

defendant would be liable, no matter what the condition of the engine. But if the company was not negligent in that respect in allowing this inflammable material to accumulate on the right of way, then before you can find it liable in this case, you must find it was negligent in the equipment of its engine, and that the sparks communicated from this engine by reason of negligent equipment.

Mr. McCOURT.—Now, the instructions, I think, that followed that, was to the effect that the plaintiff must show that the fire occurred in inflammable material along the right of way; also with regard to the instruction that the fire must occur or start on the right of way. I take no exception to that part of it, but the Court added to it that it must have started in inflammable material on the right of way. Our contention is, if there was no extraordinary or careless accumulation of material on the right of way, and the fire started in a building, say, or a pile of lumber properly on the right of way, from the negligent equipment of the engine, they are still liable.

COURT.—I think I explained that.

[Instructions Requested by Defendant, etc.]

Whereupon it is now certified that defendant, before the argument of the cause to the jury had begun, requested the Court to instruct the jury in its behalf as follows:

“The right of the plaintiff to recover in this case, if it exists, is based upon negligence in some or all of the particulars mentioned in the complaint. The mere fact that there was a fire at or about the time

that the engine of defendant passed along over this right of way in the vicinity of where the fire started, and that a fire thereafter occurred, does not entitle the plaintiff to recover."

Which instruction the Court refused to give, except as the same may be covered by the general charge, to which refusal the defendant then and there, in the presence of the jury and counsel, and before the jury retired, duly excepted, which exception was allowed.

Whereupon it is now certified that the defendant, before the argument of the cause to the jury had begun, requested the Court to instruct the jury in its behalf as follows:

"There is no evidence in this case tending to show that any spark or coal from this engine used by the defendant at and before either of these fires, set either of these fires, and there is therefore no presumption that the appliances emitting any spark or coal, or permitting any spark or coal to escape therefrom was out of repair or defective, or that the engine was carelessly or negligently operated."

Which instruction the Court refused to give, to which refusal the defendant then and there, in the presence of the jury and counsel, and before the jury retired, duly excepted, which exception was allowed.

Whereupon it is now certified that the defendant, before the argument of the cause to the jury had begun, requested the Court to instruct the jury in its behalf as follows:

"The fact, if you so find, that these engines at

either of these times or at other times, may have allowed sparks to escape, and that such sparks may have been alive or sufficient to burn the skin of a person who might be riding on the train immediately behind such engine, would not of itself be any evidence that the defendant was negligent, or that these spark-arresters or other appliances were defective or out of repair, or that the engine with these appliances was negligently operated. The defendant did not insure that sparks might not escape from its engine in a good state of repair with reasonably safe appliances and operated by reasonably careful and prudent persons in a reasonably careful and prudent manner, and it is only when such sparks are scattered in unusual quantities or of unusual size, that any inference of negligence in that particular can arise or be found by the jury."

Which instruction the Court refused to give, except as the same may be covered by the general charge, to which refusal the defendant then and there, in the presence of the jury and counsel, and before the jury retired, duly excepted, which exception was allowed.

Whereupon it is now certified that the defendant, before the argument of the cause to the jury had begun, requested the Court to instruct the jury in its behalf as follows:

"I instruct you that under the law and the evidence in this case, the United States, by its officers and agents, had authority to sell this burned timber, either with or without any other timber that might be left standing. If you find from the evidence that

if the United States, by its officers and agents in charge, by the exercise of reasonable diligence, could have sold the burned timber and realized therefrom so as to reduce the damage which may have been caused by the fire, then the plaintiff in this case would not be entitled to charge the defendant for any damages which could have been thereby avoided, even though you find that the defendant negligently caused the damages or some portion of the damages claimed on account of either of the fires respectively. By this I mean that if the timber which was burned over could by reasonable diligence have been sold for as much as the plaintiff claims such timber was worth at the time, and if such sales could have been made within a period of two or three years, and thereby the damages reduced or wholly avoided, then to the extent that the plaintiff could have reduced such damages by such sale, even though it was the full value of such timber, the plaintiff would not now be entitled to charge the defendant therewith."

Which instruction the Court refused to give, except as the same may be covered by the general charge, to which refusal the defendant then and there, in the presence of the jury and counsel, and before the jury retired, duly excepted, which exception was allowed.

Whereupon it is now certified that the defendant, before the argument of the cause to the jury had begun, requested the Court to instruct the jury in its behalf as follows:

"There has been some evidence introduced in this case tending to show what was the market value of

this timber at the time it was burned. The market value of this timber is the price which it would bring when it was offered for sale by one who desires to but who is not obliged to sell it, and is bought by one who is under no necessity of having it; and if you find from the evidence that the United States by its forestry officers or other persons having charge of its business, attempted to sell or offered for sale this burned timber at a price beyond its market value, as I have defined it, then the fact that there was no sale under such circumstances would be no evidence that the plaintiff had used reasonable diligence in attempting to make such sale or in attempting to avoid the loss caused by such fire or fires."

Which instruction the Court refused to give, to which refusal the defendant then and there, in the presence of the jury and counsel, and before the jury retired, duly excepted, which exception was allowed.

Whereupon it is now certified that the defendant, before the argument of the cause to the jury had begun, requested the Court to instruct the jury in its behalf as follows:

"In determining the market value of stumpage of this timber at the time and place of either of these fires, you should take into consideration the location of the timber, its accessibility to transportation facilities, the character of the timber as to quality and quantity on the lands affected, the facilities or difficulty of logging the same and delivering the timber to market, the availability of such timber for use; the extent and accessibility of the markets, the convenience or inconvenience to the logging streams,

or other means of transportation, its remoteness or nearness to mills or other customers that might have use therefor, and all the facts surrounding the incident, and determine as best you can from the evidence whether or not such timber had a market value per thousand feet, and if so, what it was, under all the circumstances, and, determining the market value, apply the rule that it is what property offered for sale by one who desires to sell but is not obligated to sell, would bring, being bought by some one who is under no necessity of buying it, and who is willing to pay the price, for any useful purpose."

Which instruction the Court refused to give, to which refusal the defendant then and there, in the presence of the jury and counsel, and before the jury retired, duly excepted, which exception was allowed.

Whereupon it is now certified that the defendant, before the argument of the cause to the jury had begun, requested the Court to instruct the jury in its behalf as follows:

"Any changes or precaution adopted by the defendant since these fires, if any, cannot be considered by you. A party has the right to adopt changes or take precautions after a fire that may be deemed more effective, and these changes or precautions cannot be considered as any admission or evidence that they were necessary or should have been adopted or in use before or at the time of the fires."

Which instruction the Court refused to give, to which refusal the defendant then and there, in the presence of the jury and counsel, and before the jury

retired, duly excepted, which exception was allowed.

Whereupon it is now certified that the defendant, before the argument of the cause to the jury had begun, requested the Court to instruct the jury in its behalf as follows:

“The plaintiff alleges in its complaint, and has introduced some evidence to the effect that the defendant’s right of way was not kept clean and free of combustible material liable, by sparks or coals discharged by its engines, to communicate fire to the property of others. On that subject I instruct you that the burden of proof rests upon the plaintiff to show that the fire started on the right of way, for unless that fact be established, the alleged negligence of the railroad company in suffering the combustible material to get on its right of way was not the efficient and proximate cause of the accident, and upon that allegation of negligence the plaintiff would fail.”

Which instruction the Court refused to give, to which refusal the defendant then and there, in the presence of the jury and counsel, and before the jury retired, duly excepted, which exception was allowed.

[Defendant’s Exceptions to Instructions, etc.]

Whereupon it is now further certified that the Court, in reply to counsel for defendant as hereinbefore set forth, stated to the jury as follows:

“My understanding of the record was that the railroad company’s map of location was filed at the time when the record here shows this land all public land, and unsurveyed land, and that there is no evi-

dence to show that McRae's settlement was prior to that time."

To which statement the defendant then and there, in the presence of jury and counsel, and before the jury retired, duly excepted, which exception was allowed.

Whereupon it is further certified that the Court instructed the jury as follows:

"Now in this, as in all cases, it is the duty of a party to reduce his damages as much as can reasonably be done under the circumstances, and therefore, if you believe from the testimony that after this timber had been burned, it could have been disposed of by the Government officials for any sum—according to what sum it could have been disposed of, if it had an opportunity to sell it—it was, I think, its duty to have done so and thus reduce the damages, but in determining that question, and in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of this timber; whether they had an opportunity to sell it; whether they could have disposed of it, and all the circumstances that surrounded the location and condition of this particular timber now in controversy. If these people could have sold this timber—if there was a market for it and they could have sold it and gotten something for it—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire."

To which instruction the defendant then and there, in the presence of jury and counsel, and before the jury retired, duly excepted, which exception was allowed. And the defendant particularly excepted to that portion of said instruction as follows:

“And in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of this timber.”

And the defendant duly excepted particularly to that portion of said instruction as follows:

“If there was a market for it and they could have sold it and gotten something for it—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, there was no market for it, and no opportunity to sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire.”

To each of which said portions of said instruction the defendant then and there, in the presence of jury and counsel, and before the jury retired, duly excepted, which exceptions were, and each thereof was, allowed.

Whereupon said jury retired to consider of their verdict, in charge of an officer duly sworn as by law provided.

Whereupon, after deliberation, said jury returned into court a verdict in favor of the plaintiff and against the defendant in the sum of Four Thousand Four Hundred Twenty-two and Thirty-eight One-hundredths (\$4,422.38) Dollars.

Whereupon on the 29th day of March, 1910, judg-

360 *The Corvallis and Eastern Railroad Company*
ment in favor of plaintiff and against the defendant on said verdict was entered by said court, in the sum of \$4,422.38, together with its costs and disbursements taxed at \$724.21.

It is further certified that the time of defendant in which to file a motion to set aside said judgment, and for a new trial herein, and to tender a Bill of Exceptions in said cause, was from time to time extended to and including October 3, 1910.

Whereupon on the 3d day of October, 1910, the said defendant duly served and filed its Motion for a New Trial, upon the grounds therein stated, and tendered therewith this, its Bill of Exceptions, within the time allowed by order of the Court.

Whereupon on the 9th day of November, 1910, said Motion for New Trial was overruled.

Whereupon the Court being willing to preserve the record in order that its rulings may be reviewed for error, if any there be, certifies that the foregoing Bill of Exceptions contains all of the evidence offered or admitted upon the trial of said cause, together with the rulings of the Court thereon, and the rulings of the Court in admitting or excluding testimony at said trial, together with the instructions given by the Court, the instructions requested by the defendant and refused, and the exceptions taken to the rulings of the Court and to any instructions given or refused, or any part thereof, and the exceptions allowed thereon.

It is further certified that there is attached to and made a part of this Bill of Exceptions all of the exhibits offered or admitted in said cause, which are

hereto attached and made a part hereof, marked Exhibits.

[Order Settling, etc., Bill of Exceptions.]

Whereupon this Bill of Exceptions is now here settled, certified and signed, this 9th day of November, 1910.

R. S. BEAN,

Judge of said Court.

The within Bill of Exceptions tendered this 3d day of Oct., 1910.

R. S. BEAN,

Judge.

[Admission of Service of Bill of Exceptions.]

State of Oregon,

County of Multnomah,—ss.

Due service of the within Bill of Exceptions is hereby admitted to have been made upon plaintiff and upon me as attorney for plaintiff, this 3d day of October, 1910, by receiving a copy thereof duly certified by Wm. D. Fenton, of attorneys for defendant.

JOHN McCOURT,

By ROBERT F. MAGUIRE,

Assistant United States Attorney, and Attorney for Plaintiff.

Bill of Exceptions. Filed November 9, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 18th day of November, 1910, there was duly filed in said court, a Petition for Writ of Error, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the
District of Oregon.*

No. 3164.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY,

Defendant.

Petition for Writ of Error.

Now comes the Corvallis and Eastern Railroad Company, defendant herein, and says that on the 29th day of March, 1910, this Court entered judgment herein in favor of the United States of America, plaintiff above named, and against this defendant, Corvallis and Eastern Railroad Company, for the sum of \$4,422.38, with legal interest thereon from that date at the rate of six per cent per annum, and the costs and disbursements of said action, taxed at \$724.21; that on November 9, 1910, said Circuit Court overruled the motion of the said defendant to set aside said judgment and for a new trial in said cause, and said judgment has now become final in said Circuit Court, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of

which will more in detail appear from the assignment of errors which is filed with this petition.

And the defendant herein now makes the following assignment of errors upon which it will rely, and which will be made to appear by return of the said record in obedience to said writ of error herein prayed for.

Wherefore this defendant prays that a writ of error may issue in its behalf out of the Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

CORVALLIS & EASTERN RAILROAD
COMPANY,

By WM. D. FENTON,

One of Attorneys for Petitioner.

J. K. WEATHERFORD,

WM. D. FENTON,

BEN C. DAY and

JAMES E. FENTON,

Attorneys for Petitioner.

Due service of this petition admitted to have been made upon the plaintiff and upon me this 17th day of November, 1910.

JOHN McCOURT,

United States Attorney, and Attorney for Plaintiff.

Petition for Writ of Error. Filed November 18, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 18th day of November, 1910, there was duly filed in said court an Assignment of Errors, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY,

Defendant.

Assignment of Errors.

The defendant in this action, connected with its Petition for Writ of Error, makes the following Assignment of Errors which it avers occurred at the trial of the cause, to wit:

I.

Said Circuit Court erred in overruling the objection of the defendant to the following question propounded by counsel for plaintiff to the witness O. E. Haring, as follows:

Q. Did you attempt, in locating places upon the map, did you locate them accurately, or how did you get the information?

To which counsel for defendant objected upon the ground that the same was incompetent, irrelevant and immaterial, and for the further reason that the complaint does not state facts sufficient upon which to base an action either for the first or second causes

of action; which objections were overruled, to which ruling the defendant then and there excepted, which exception was allowed and saved as to all that class of testimony, and to any testimony.

II.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness Chas. B. Merrick, and said witness to answer, over the objection and exception of defendant, the following question:

Q. And that land indicated there in pink is public land as shown by your record?

To which counsel for defendant objected on the ground that the same is not the best evidence and not the method by which the plaintiff can prove title to its lands; that the complaint in this case does not state what particular lands the plaintiff owns, or where the fire occurred, and is silent as to the particular engine, and that plaintiff is seeking to prove title by parol; which objections and each thereof were overruled, to which ruling defendant duly excepted, which exception was allowed, and the witness testified:

That the sections indicated, or subdivisions indicated by the pink were public lands, with two exceptions, that is, there is no record of section 16, and it is assumed to be state land, section 16, 10 south and 5 east, and this was school land, but they have no record of it; did not examine his records to see if any lieu land selection had been made releasing that to the United States; there had been some grants in that section, some homesteads granted, but no vacant

lands there were showed owned by the Government, in fact he paid no attention to it; he compared tract-books with lands having lines through it, to determine whether or not that was shown to be patented or deeded lands by the record, and it was so shown.

III.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness Lloyd Allen Whitman, and said witness to answer, over the objection and exception of defendant, the following:

Q. On or about the 23d day of July, 1906, did you observe any fire along and upon the right of way of the defendant railroad at a point west of Detroit?

To which counsel for defendant objected as a conclusion of the witness, and as immaterial, and also then objected to the preceding question; which objections and each thereof were overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness testified:

“He would not swear that it was July 23d, 24th, or 25th, but it was about that time; when he first saw evidence of fire along the defendant’s right of way he was about twenty rods below what is called Granite Mountain Siding station; about an hour after the train went down they saw a large amount of smoke about a mile and a half or a mile from them; he was east of the smoke, between the smoke and Detroit, his father was with him; the train was going west that he saw, and it was about two o’clock in the afternoon; he went down to where the fire was at six o’clock in the evening.”

IV.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness Lloyd Allen Whitman, and said witness to answer, the following question:

“Q. Had you seen any other fires immediately prior to that?”

To which counsel for defendant objected as incompetent and immaterial, and moved to strike out the testimony of the witness in regard to another fire; which motion was denied, and the objections and each thereof overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness further testified:

“That he had seen two small fires, one was a fire that he found burning between the rails; it started outside of the rails when he was on his way to the fire of August 11th, on the track where the train had just passed over.”

Said witness further testified just before the testimony last above set forth, as follows:

“He had seen a railroad man light a cigar and throw the match down as late as nine o’clock at night, as an experiment, and it took fire.”

V.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness C. D. Matheny, and said witness to answer the following question:

“Q. Did you observe during those trips and during that time the condition of the right of way as to

being—as to the accumulation thereon of combustible material?”

To which counsel for defendant objected as incompetent and immaterial, except as to the particular point where the fire originated, and the plaintiff has already designated where the fire originated; which objection was overruled, excepting that the Court ruled that the witness could testify, and that there would have to be particular inquiry later, as to whether at the place where the fire was.

Whereupon said witness was further interrogated and testified as follows:

“Q. The question is, did you observe the condition? A. Yes, sir.

Q. What was the condition? Do you know about where—or rather, did you notice that condition west of what is known, or east of,—no, west of what is known as the water-tank?”

To which counsel for defendant objected as immaterial, incompetent and irrelevant, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered and further testified as follows:

“A. West of the water-tank?

Q. Or about where the fire of July 23d was said to have commenced? A. Yes, sir.

Q. How is that? A. Yes, sir, I was up there.

Q. What was the condition of the right of way along there?”

Whereupon counsel for defendant renewed said objection last above set forth, and asked that the witness should fix the time; whereupon the witness fur-

ther testified as follows :

“Q. At the time shortly before the fire occurred.

A. Well, there was combustible matter, dry limbs, and grass and things like that on each side of the track, but on the right of way, that is, between the rails and along the track, and about where that fire originated, I think was reasonably clean.”

Whereupon said witness further testified: That this was right in the track, there was trash and limbs and broken logs and things like that right up in places along there within eight or ten or twelve feet of the track, but the immediate track was reasonably clean, but outside of that it was like in a great many other places through the timbered belt, it was not clean; the limbs were mostly dry, dead limbs, the grass at that place was mostly green, there was green grass along; it was shaded and timber along there mostly; the brush that he speaks of came from sliding down the mountains, it is right along the north side of the track a steep mountain; a tree will fall and the limbs and stuff will slide right down this mountain close to the track; it is on just a small flat there, and things falling from this side clear—slide down and accumulate along the track below; the condition of the track at or about where the fire touched the track, known as the fire of August 11th, near the old cabin, was pretty clean at that place, but on the north side of the track it rises up steep and has to be logged off, and the grass there is pretty thick on that place, and a good many old tree tops where it has been logged—dry limbs, and along about June and July, facing the sun it gets dried, the grass is dry there,

and that was the condition at that time, the grass and material were pretty dry; the grass had all died, nearly, by that time, facing the sun, it was dry, and the grass turned white and it was very easy for fires to catch there, because it was open to the sun, it wasn't shaded.

VI.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness, C. D. Matheny, the following question:

"Q. State whether or not you observed them throwing sparks or cinders likely to set fire, about that time.

To which counsel for defendant objected, unless it referred to this particular day; which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

"A. Yes, I did."

Said witness then further testified that he knows that he had observed them throwing sparks or cinders at different times along the road from there up to Detroit.

VII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness V. Matheny, and said witness to answer, the following question:

"Q. Did you notice in your trips up and down the track there the general condition of the right of way of the company?"

To which counsel for defendant objected as incom-

petent, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

“A. I had.”

Whereupon said witness was further interrogated and testified, over the said objection and exception of defendant, allowed by the Court, as follows:

“What was it as to the accumulation of inflammable and combustible material? In other words, what did you observe along the right of way?

A. At *thus* particular point, or everywhere?

Q. Near those points; generally between the west boundary of the Cascade Forest Reserve there and this fire of the 11th of August.

A. Oh, in almost any place along between the water-tank, close to the water-tank, where the west boundary of the Forest Reserve is east, there is to be found plenty of brush; that is, close along the track—or either way, close up to the track; there is plenty of brush, fern, limbs—a few places there is logs.

Q. What was the condition of these limbs?

A. Dry at this time of the year.

Q. Brush, grass and logs?

A. Dry at this time of the year.

Q. What sort of a summer had that been?

A. Very dry.

Whereupon it was certified that all of the foregoing testimony was objected to upon the ground that it takes in the whole trackage, which objection the Court overruled, to which ruling the defendant then and there excepted, which exception was allowed.

VIII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness, Fred W. Stahlman, and said witness to answer, over the objection and exception of defendant, the following questions:

“Q. Now, what was the condition, and what was there upon the right of way of a combustible or inflammable nature?

A. Well, I don't know how to define that right of way. What distance it would be from the rails.

Q. Well, you state what was there and how near it was to the rails. I will define that later.

A. Well, I noticed dead fern, brush and grass.”

To which counsel for defendant objected, and to any testimony thereafter as to the condition of said right of way or track as to combustible or inflammable material thereon, as too remote; which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and said witness further testified as to the condition of said right of way or track as to combustible or inflammable material, as shown in the Bill of Exceptions herein.

IX.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness, Fred W. Stahlman, and said witness to answer, the following question:

“Q. Now, what sort of cinders and sparks were those that you saw the engine throwing?

A. Those cinders were small, perhaps $\frac{1}{8}$ or $\frac{1}{4}$ inch in size and were still burning.”

To which counsel for defendant objected as incompetent, irrelevant and immaterial, and particularly upon the ground that the witness does not identify this engine or the engine that was there, the same locality or the same condition, or what the engine was doing, or anything of that kind; which objections were and each thereof was overruled, to which ruling the defendant then and there excepted, which exception was allowed.

X.

Said Circuit Court erred upon the trial of said cause in overruling the motion of the defendant to strike out the answer of the witness Fred W. Stahlman, as follows:

“A. I noticed a particular instance above Detroit, there was one place particular, sawdust accumulated both sides of the track, I stopped there on my way home from the mill to dinner, and a train passed me and noticed sparks drop. I stopped and watched them a few moments and seen them take fire, the sawdust. I put the fire out.”

Upon the ground that the same was incompetent, irrelevant, which motion was denied, to which ruling the defendant then and there excepted, which exception was allowed.

XI.

Said Circuit Court erred upon the trial of said cause in overruling the motion of defendant to strike out as incompetent and irrelevant the following testimony of the witness Fred W. Stahlman:

“Q. Still burning. What observation did you make?

A. I was standing one evening close to the track when the train came in and the sparks, I felt them dropping on my hat. Taken my hat off to see where it was singed, where the live sparks had dropped.

Q. How long before this fire at McRae’s cabin there, or afterwards, were those occasions?

A. It was after, some time during that summer. I am not positive as to the time.

Q. Afterwards? A. After the fire.

Q. What is your best impression as to how long after? A. Perhaps a month.”

To which ruling the defendant then and there excepted, which exception was allowed.

XII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness Charles C. Giebler the following question, over the objection and exception of the defendant, to wit:

“Q. What did you see on the right of way there along the track?” (Confining it from the water-tank to the fire along McRae’s place, along there.)

To which counsel for defendant objected as incompetent, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and the witness answered:

“A. Along there is logs that had been cut and rolled down from where the right of way was first made, alongside the slope of the right of way. Ferns been cut, and brush, you know, and left hay, and

then vines would grow over it.

Q. At this time—Sunday before the fire—what was the condition of that stuff?

A. Why, it was dry at that time of the year—generally pretty dry up in there.”

XIII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to interrogate, and the said witness, Frank Ellsworth, over the objection and exception of the defendant that the same was incompetent, irrelevant and too remote, to testify as follows:

“Q. Now, on these trips that you went up there, did you have occasion, or did you observe, the engines and locomotives—or the locomotive of the Corvallis and Eastern Railroad, as to whether or not it threw fire?

A. Well, say, I don't know whether it ever threw any fire; can't remember as to it ever throwing fire; I never seen them throw fire. I tell you what I saw one time. I was in Albany there when they picked up a load of hard wood at Santiam, and came in, the whole top afire; how it come on fire, I don't know, but it was on fire, I seen it myself.

Q. Was that the engine that drew the regular train?

A. That is the engine that drew the regular train, yes, sir.

Q. That was hauling that car?

A. It was hauling that car of hardwood there for the chair factory there in Albany.

Q. How long before or after the 23d of July, or

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the 11th of August, was this?

A. It was after that, shortly after, I can't tell the date.

Q. What is your best impression?

A. I don't know.

Q. Now, what is your best recollection as to how long after?

A. It was along shortly after that; two or three months after that; won't say sure, somewhere along there; I never kept no dates or anything about it; I don't know.

Q. Think as much as two or three months?

A. I think so.

Q. Now, then when you went up there on these trains, during July and August, up to Detroit, and along that piece of road from the water-tank on up, and Mill City on up, what if any precautions did you take with the wearing apparel you had with you to keep it from catching fire?

Q. How often would you move—the gang of you—from one place to another on these trains?

A. It would come different ways, sometimes we would go once or twice a month, and other times not; it depends on the work.

Q. Would you go clear up once or twice a month—how often would you move?

A. Sometimes on a big job—sometimes a month on bridge—other times a week; sometimes two weeks on a bridge, other times three weeks.

Q. What would you do when you got through working on a bridge?

A. Go to another or go to a cattle-guard or something.

Q. On the regular train?

A. On the regular train that we traveled on and went up to Detroit.

Q. Did these trips occur during the months of July and August?

A. Yes, we all went up there. Hold on! In July and August we was working on the Albany bridge; did not go so very often then; was putting trestle in the Albany bridge; went once a month probably; sometimes oftener, sometimes we didn't. I went to Detroit the next Monday morning. I went home and stayed over Sunday; Monday went through. The boys was at Detroit; we went back then, because the fire was away from the railroad track, and we thought the danger was over, and went back.

Q. Now, how long before that had you been up there?

A. I can't tell you at all.

Q. Was it within two weeks or a month?

A. I think longer than two weeks, because we was working on the Mill City bridge, and I think that was two or three weeks.

Q. Where did you go from the Mill City bridge, or where had you been before you started to work on the Mill City bridge?

A. I think we came from Albany; think we had been at Albany to work.

Q. Between the time of the fire and the time you went to work on the Mill City bridge, had you been to Detroit?

A. Before the fire?

Q. Yes.

A. Yes, we had been to Detroit before the fire, yes, sir.

Mr. FENTON.—He don't say whether several months or two months before.

A. Well, I can't tell you because I don't know, and I won't tell what I don't know.

Q. Between the time you first went to work on the Mill City bridge, and the fire, had you been to Detroit?

Q. You mean before the fire?

Q. Yes.

A. Yes, we had been there, but I don't know when.

Q. You had gone to work on the Mill City bridge about two weeks before?

A. Yes, about two weeks before; we was fixing a pier, at the end of the Mill City bridge.

Q. Now on these trips, where did you ride?

A. I will tell you; sometimes I rode in the engine, and sometimes I rode all over—in the coach behind, and changed around; did not exactly always ride in one place.

Q. Did you see the train that came up that day that the fire was set at the water-tank?

A. Yes, sir; I was working at Mill City then—that day; I saw the train, yes, sir.

Q. Do you recall what sort of a train it was as to being long or short?

A. No, sir; I couldn't tell you; I don't know anything about that; I couldn't tell you because I don't know.

Q. As to the train that went up the day of the fire by Berry—there at McRae's place—did you observe that train?

A. No, sir; I don't know; I can't tell you because I don't remember.

Q. I will ask you whether or not you rode on the outside—on the flat car, when you had handcar?

A. No, I don't—I don't know where I rode. I can't tell you.

Q. Do you ever ride outside?

A. Sometimes."

To which testimony and the whole thereof the defendant then and there objected, and moved to strike out, for the reason that the same was incompetent and irrelevant, and too remote, which motion was overruled, to which ruling the defendant then and there excepted, which exception was allowed.

XIV.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to interrogate the witness Frank Ellsworth, and said witness to testify, as follows:

"Q. Now, on these occasions did you observe whether or not the engines threw sparks that lit alive? Just tell the jury what you know about these engines throwing sparks, without my drawing—

A. Well, sir, they throwed quite a few sparks; we always had our oil coats—I generally put mine under the flat car to be safe; I never had it on fire, but I wanted to be safe."

To which counsel for defendant objected as incompetent, irrelevant and too remote, which objec-

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tions and each thereof were overruled, to which ruling the defendant then and there excepted, which exception was allowed.

XV.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness Daniel D. Bronson, and said witness to answer as follows:

“Q. What sort of timber was that?

A. As soon as it got away from this old burn, there was a good stand of red fir timber, with some hemlock in it; valuable timber.”

To which counsel for defendant then and there objected as incompetent and immaterial, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed.

XVI.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to offer, and in admitting in evidence, over the objection and exception of defendant that the same was incompetent and immaterial, and a self-serving declaration, Exhibits 4 and 5, as follows, to wit:

EXHIBIT 4.

“Portland, Oregon, Apr. 24, 1906.

“Mr. John A. Shaw,

Sec’y Corvallis & Eastern R. R.

Albany, Oregon.

“Dear Sir:

“Your right of way through the Cascade Forest Reserve in T. 10 S., R. 5 E. is reported by Ranger

Harry G. Hayes as being in a very dangerous condition as regards brush, debris, rotting logs and ties, and is a menace to valuable timber owned by the Government on account of the liability of a spark from an engine starting a fire in this inflammable material which might result in great damage to other property by the spreading of forest fires thus started, in the dry season.

“I enclose a copy of his report made after making a personal examination, and also a few kodak prints taken by him to verify his statements.

“In view of this dangerous condition of your right of way, I will ask you to take measures as soon as possible to clean up this right of way, and until this is accomplished, during the dry season to maintain a fire patrol after each train.

“While such action on your part cannot be compelled under the present State or Federal laws, yet it would seem advisable for you to attend to this matter, both on account of the general good that would be accomplished by removing the danger to all property within a considerable distance of your line, and also for your own protection, as it is the opinion of the Assistant United States Attorney that damages could be collected for property destroyed through your neglect in leaving this inflammable material on your right of way, and thus producing a menace to nearby property.

“I enclose copy of the opinion of the Assistant United States Attorney in this matter.

“If this right of way is not cleaned up by you in a thorough manner, and if a fire is started on account

of neglect in not burning this debris, etc., resulting in damage to Government timber, the Government will at once take measures to recover full damages, on the grounds that the damage was caused by negligence on your part in allowing your right of way to be covered with inflammable material, which was a menace to the property of others.

“Very truly yours,

“(Signed) D. D. BRONSON,

“Forest Inspector.”

“3 enclosures.”

EXHIBIT 5.

“April 26, 1906.

“Mr. Daniel D. Bronson,

Forest Inspector,

Customs House, City.

“Dear Sir:

“Yours of the 24th inst. to hand relative to the condition of the right of way of the Corvallis & Eastern R. R. in Township 10 South, Range 5 East. I have sent the correspondence to Mr. J. K. Weatherford, Vice President of the company, who will take the matter up with our Superintendent. I will advise you as soon as possible in regard to what they will do relative to cleaning up the right of way.

“Yours truly,

“JOHN A. SHAW.”

XVII.

Said Circuit Court erred upon the trial of said cause in admitting in evidence, over the objection and exception of defendant, that the same was incompetent under the pleadings, and evidence tending to

show the condition of the engines of defendant just prior to July 23, 1906, or that any engine of defendant was out of repairs.

XVIII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness Jacob Merle, and said witness to testify as follows:

“Q. Now, supposing an engineer made no entry in that book, what was done with reference to examining the engine and putting it in repair?

A. None at all, in that time.”

To which counsel for defendant objected as incompetent and not pleaded, and moved to strike out the same as incompetent and not pleaded, which motion and objection and each thereof was overruled, to which ruling the defendant then and there excepted, which exception was allowed, and said witness further testified over said objection as follows:

“Q. What was the condition, Mr. Merle, if you remember it, of the engines or engine which run up to Detroit at or about the 23d day of July, as to its spark-arresting or fire-arresting devices and apparatus?

A. After the engine being repaired, and being examined, and being reported several times, I eventually found the stack in bad condition.

Q. Who reported it?

A. Mr. Simpson, the engineer.

Q. Who was he?

A. He was running engines one and two. We used to have two big engines and kept them for the

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east end of the run principally, and very seldom we would run a little engine on that run, because the work is heavy up there; and he was the man referred to.

Q. What report did he make?

A. Well, he made several reports.

Q. Now, do you remember whether or not engineer Simpson made such a report on the day of this fire—yes, on the day of this fire, or do you know?

A. Yes, sir.

Q. In this book? A. Yes, sir.

Q. After—on the return from the trip after the fire?

A. Well, he told me that they claimed that they set fire. So that is all I—that is as near as I can say from the date of the book—that it is after the fire.”

COURT.—Strike out the testimony as to conversation with Simpson.

XIX.

Said Circuit Court erred upon the trial of said cause in permitting the witness Jacob Merle to testify over the objection and exception of defendant that the same was incompetent and immaterial, and in refusing to strike out said testimony for the reason that the same was incompetent and immaterial, which testimony is as follows:

“Q. Will you please state the condition you found that engine in after the July 23d fire, pursuant to the report made to you?

A. After the engine was reported, I examined the netting and stack; I told them it was pretty hot yet to examine—

Q. Never mind what you told them. Tell the jury what you found.

A. I got up and examined the engine with a torch. It was so hot you could not get in there, and the engine had to be used the next morning, and with a torch I could not see anything in the stack, because it was too hot to get your head down in there. I waited until about eight o'clock, trying to find the master mechanic, to report to him what had happened; and they asked me if I could see anything. I told them no, and they allowed the engine to go out the next day."

Whereupon said witness further testified as follows:

"They had to work at it the following day, and concluded to hold the engine and take the stack off the engine, and the barrel of the stack of this engine stands up maybe two feet on the inside, cannot tell how many inches, could figure it out on a blue print map; it had no hole out in the bottom of the barrel of the stack to allow cinders to go into the smoke-box; the base of the stack to the top of the barrel was full of cinders, and they were hot; he got down on the floor and took all these cinders out; searched the netting and could not find anything wrong with the netting; held the smokestack there all that day until late in the evening, waiting for the master mechanic to come and look at it himself, to see if he could see anything wrong with it; he didn't come, and about 7 o'clock that night he had the stack on, and told them, and let the engine go out; it went out a few days, and he had to look at it again—complaint made of the engine

again; they concluded to take stack off and put another one on, and they done so, and shortly after this other engine that had this stack, it was reported, and he got up on this engine and looked at the stack, and found between the casting of the trap-door, where the man that had put the netting in didn't have material enough to reach over to the flange, consequently he could take his rule by opening it two inches single thickness—two foot rule—and put it between the casting and the netting; he went to work and got some pieces of netting—the engine had to be used—and put in three different pieces, he thinks; they have six courses in that or more—the same stack went on the second engine; on that engine at that time he put them in and flanged them out, and that stack was all right after that; consequently he concluded there was trouble with the stack; he had taken that stack down before that and put two holes—had the machinist drill two big holes in the barrel of the stack; first thought that was the cause, and after the holes were cut in, and made the same as the other stacks, there were still complaints made, and after that he located the trouble under that trap-door between the lower casting of the trap-door—the base, and the netting, and he fixed it; was up at Breitenbush Springs after the second fire, talking about it, one thing and another; it was after the second fire that he located that stack, but there was another stack reported on another engine afterwards, on two or three engines that run up there; engine 2 was reported, it had been running up there; engine 1 was reported again, and found in bad condition.”

XX.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to interrogate, and the witness Jacob Merle to testify, over the objection and exception of the defendant that the same was incompetent and not pleaded, as follows:

“Q. Now, on these examinations, what condition did you find the ash-pan of this engine in? That is, the apparatus underneath to—

A. Mr. Walsh had come and asked me to look over the ash-pans at that time, and we found the ash-pan netting—after looking at the stack and everything, he insisted on looking at all the ash-pans; they looked at engine one’s ash-pan and the netting did not come up to the mud rim by two inches—the piece of netting; the ash-pan is maybe eight to ten inches deep, and the netting came—it is bolted on with three bolts on the bottom of the ash-pan, two bolts on the side; there was a space of two inches; he looked through the wheel himself; he insisted on my putting a piece of netting across; we did not bolt it on but sewed it on with wire, and it remained in that way that season.”

XXI.

Said Circuit Court erred upon the trial of said cause in admitting in evidence the testimony of the witness Jacob Merle, over the objection and exception of defendant, that the same was incompetent and not pleaded, and in refusing to strike out the same as incompetent and not pleaded, as follows:

“There was nothing between this mud ring and the piece of netting when the damper was open; when it was shut, the damper was close; there was an aper-

ture for the escape of sparks and coals—you could put your arm through it—the full length of the ash-pan, full width of it; in one corner of that pan the ashes had accumulated all around, they were kind of hot, and it bucked it up; he corked in asbestos, and kind of fixed it down.”

XXII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to interrogate the witness Jacob Merle, and said witness to testify, over the objection and exception of the defendant that the same was incompetent and not within the issues, as follows:

“Q. Now, then, were you an experienced man in the examination and repair of stacks and apparatus?

A. I would like to rectify that statement. I had that door fixed, I didn’t do it myself, I had it fixed, I put it up.”

XXIII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask said witness Jacob Merle, and said witness to answer, over the objection and exception of the defendant that the same was incompetent and not within the issues made by the pleadings, and because the witness said he did not do it, but had it done, as follows:

“Q. What I am asking is, in the examination and keeping in repair of the stacks, if you were an experienced man in that business, and knew how to do it?

A. I never had to do it in my life, only being around seeing men do it.”

XXIV.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness Jacob Merle, and said witness to testify, over the objection and exception of the defendant that the same was conjectural, speculative and incompetent, as follows:

“Q. Now, that—how was it that that stack was allowed to get in that condition, then?

A. Having no man detailed to examine the engines on their arrival on every trip, consequently they were never examined until the engineer reported them.

Q. Reported them how?

A. Reported that there was something wrong with the engines—with the stack.”

XXV.

Said Circuit Court erred upon the trial of said cause in refusing to strike out the testimony of said witness Jacob Merle hereinafter set out, as tending to show negligence not charged in the complaint, and as incompetent, as follows:

“A. Having no man detailed to examine the engines on their arrival on every trip, consequently they were never examined until the engineer reported them.

Q. Reported them how?

A. Reported that there was something wrong with the engine—with the stack.”

XXVI.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the

witness A. E. Cahoon, and said witness to testify over the objection and exception of the defendant, as follows:

“Q. I will ask you what difference there was between the price you fixed upon them between the first grade and the second grade?

A. The difference between the two grades?

Q. Yes, and I will ask you what you placed upon the first grade and what you placed upon the second grade?

A. Fifty cents per thousand feet for the second grade and \$1.25 for the first.”

XXVII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness James Taylor, and said witness to answer, over the objection and exception of the defendant, as follows:

“Q. What was, in sections 7, 8 and 17 here, in township 10—5 south, what was the value of timber, merchantable timber—timber such as you use in logging? A. I should say about a dollar.”

XXVIII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness E. A. Lawbaugh, and said witness to testify, over the objection and exception of defendant that the same was purely speculative and not sufficiently close to determine the market value of the timber in this case, as follows:

“Q. Now, then, from the investor’s standpoint, such men as live in the east and come here for invest-

ment and are buying through you, to hold for the rise in value?

A. That again varies as to the amount or percentage of fire killed timber to the green timber. The danger of recurrent fires. I would consider the loss of value even greater. I would consider it as high as fifty per cent depending upon the percentage of burned area and the green area. In this particular locality I consider the danger even greater from a speculative standpoint on account of the proximity of the railroad; not only due to the fact that the railroad is there, but to the fact that it is a traveled highway—people passing up and down there all the time. If it was off in an isolated place, in a cul-de-sac, where people were not going by, it would be of better value than to be near a traveled highway. Another thing, they are operating in there constantly in that vicinity. The danger of recurrent fires over the logged-over lands, of course, everybody can see that they are greater.

XXIX.

Said Circuit Court erred upon the trial of said cause in refusing to sustain the motion of defendant made at the close of all the evidence for a judgment of nonsuit upon the ground that there is not sufficient evidence to go to the jury to show that the defendant was negligent, and particularly upon the ground that there is no evidence to go to the jury upon either count of the complaint, to show negligence of the defendant; to which ruling the defendant then and there excepted, which exception was allowed.

XXX.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff, upon cross-examination of the witness J. T. Walsh, to interrogate said witness and said witness to answer, over the objection and exception of the defendant that the same was incompetent, as follows:

“Q. However, it was not discovered and threw fire and set fire, didn’t it?

A. Yes, I believe that was the question.

Q. What is your answer?

A. I don’t remember Casteel ever reporting that engine setting fire. Engine 2 that the stack was placed on after August 11th.

Q. Yes, but do you remember that after July 23d that that same stack did throw fire and set fire?

A. I don’t know where it set fire to, I never had a report of it.

Q. You did have a report that it was throwing fire?

A. Well, there was reports come in. It was reported that they were throwing fire.

Q. By the engineer?

A. Yes, sir, by the engineer, and the stacks were always examined when there was such reports made.”

XXXI.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness H. G. Hayes, and said witness to answer, over the objection and exception of defendant that the witness has testified upon that subject, and has given the conversation, and that the same is incompetent, as follows:

“Q. I will ask you whether or not you, in the winter of 1906 and 1907, had a conversation with Robert A. Shaw, you and he being on the train going from Detroit to Albany, sitting together in a seat in a coach upon that train,—in which he said to you that he paid more than a dollar per thousand for timber upon what is known as the Hansen claim, I believe—what claim is that?

A. It was the Maier’s claim.

Q. Oh, yes, Maiers, Kriesel and Carlton.

A. Yes, sir, I say he did. He did not tell me what he paid for the claim, but he told me he paid over a dollar a thousand—that those claims cost him over a dollar per thousand.”

XXXII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness H. G. Hayes, and said witness to testify, over the objection and exception of the defendant that the same was incompetent, irrelevant and not redirect examination, and that it is an attempt to impeach a witness on an immaterial matter, as follows:

“Q. Did you have a conversation with Mulkey in Detroit, Oregon, about a month or six weeks after the fire on the 11th day of August, relative to this fire?

A. I can’t get—

Q. Wait until I get through. At the front of the Curtis Lumber Company’s store in Detroit, you and he only being there present, in which he said that he passed up the track a few minutes after the train going east had passed along on that 11th day of August and that he saw a fire there in the roof of the

bunk-house, or whatever it is called, and that he could have put it out if he had had a little help or had even had a shovel to throw some dirt upon it, or words to that effect?

A. Yes, is it necessary that I tell the conversation or any more than just answer?

Q. No, I think that is all."

XXXIII.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

"The right of the plaintiff to recover in this case, if it exists, is based upon negligence in some or all of the particulars mentioned in the complaint. The mere fact that there was a fire at or about the time that the engine of defendant passed along over this right of way in the vicinity of where the fire started, and that a fire thereafter occurred, does not entitle the plaintiff to recover."

XXXIV.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

"There is no evidence in this case tending to show that any spark or coal from this engine used by the defendant at and before either of these fires, set either of these fires, and there is therefore no presumption that the appliances emitting any spark or coal, or permitting any spark or coal to escape therefrom, was out of repair or defective, or that the engine was carelessly or negligently operated."

XXXV.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

“The fact, if you so find, that these engines at either of these times or at other times, may have allowed sparks to escape, and that such sparks may have been alive or sufficient to burn the skin of a person who might be riding on the train immediately behind such engine, would not of itself be any evidence that the defendant was negligent, or that these spark-arresters or other appliances were defective or out of repair, or that the engine with these appliances was negligently operated. The defendant did not insure that sparks might not escape from its engine in a good state of repair with reasonably safe appliances and operated by reasonably careful and prudent persons in a reasonably careful and prudent manner, and it is only when such sparks are scattered in unusual quantities or of unusual size, that any inference of negligence in that particular can arise or be found by the jury.”

XXXVI.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

“I instruct you that under the law and the evidence in this case, the United States, by its officers and agents, had authority to sell this burned timber, either with or without any other timber that might be left standing. If you find from the evidence that if the United States, by its officers and agents in

charge, by the exercise of reasonable diligence, could have sold the burned timber and realized therefrom so as to reduce the damage which may have been caused by the fire, then the plaintiff in this case would not be entitled to charge the defendant for any damages which could have been thereby avoided, even though you find that the defendant negligently caused the damages or some portion of the damages claimed on account of either of the fires respectively. By this I mean that if the timber which was burned over could by reasonable diligence have been sold for as much as the plaintiff claims such timber was worth at the time, and if such sales could have been made within a period of two or three years, and thereby the damages reduced or wholly avoided, then to the extent that the plaintiff could have reduced such damages by such sale, even though it was the full value of such timber, the plaintiff would not now be entitled to charge the defendant therewith."

XXXVII.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant as follows:

"There had been some evidence introduced in this case tending to show what was the market value of this timber at the time it was burned. The market value of this timber is the price which it would bring when it was offered for sale by one who desires to but who is not obliged to sell it, and is bought by one who is under no necessity of having it; and if you find from the evidence that the United States by its forestry officers or other persons having charge of its

business, attempted to sell or offered for sale this burned timber at a price beyond its market value, as I have defined it, then the fact that there was no sale under such circumstances would be no evidence that the plaintiff had used reasonable diligence in attempting to make such sale or in attempting to avoid the loss caused by such fire or fires."

XXXVIII.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

"In determining the market value of stumpage of this timber at the time and place of either of these fires, you should take into consideration the location of the timber, its accessibility to transportation facilities, the character of the timber as to quality and quantity on the lands affected, the facilities or difficulty of logging the same and delivering the timber to market, the availability of such timber for use; the extent and accessibility of the markets, the convenience or inconvenience to the logging streams, or other means of transportation, its remoteness or nearness to mills or other customers that might have use therefor, and all the facts surrounding the incident, and determine as best you can from the evidence whether or not such timber had a market value per thousand feet, and if so, what it was, under all the circumstances, and, determining the market value, apply the rule that it is what property offered for sale by one who desires to sell but is not obligated to sell, would bring, being bought by some one who is under no necessity of buying it, and who is willing

398 *The Corvallis and Eastern Railroad Company*
to pay the price, for any useful purpose.”

XXXIX.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

“Any changes or precaution adopted by the defendant since these fires, if any, cannot be considered by you. A party has the right to adopt changes or take precautions after a fire that may be deemed more effective, and these changes or precautions cannot be considered as any admission or evidence that they were necessary or should have been adopted or in use before or at the time of the fires.”

XL.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

“The plaintiff alleges in its complaint, and has introduced some evidence to the effect that the defendant’s right of way was not kept clean and free of combustible material liable, by sparks or coals discharged by its engines, to communicate the fire to the property of others. On that subject I instruct you that the burden of proof rests upon the plaintiff to show that the fire started on the right of way, for unless that fact be established, the alleged negligence of the railroad company in suffering the combustible material to get on its right of way was not the efficient and proximate cause of the accident, and upon that allegation of negligence the plaintiff would fail.”

XLI.

Said Circuit Court erred upon the trial of said

cause in instructing the jury as follows:

“My understanding of the record was that the railroad company’s map of location was filed at the time when the record here shows this land all public land, and unsurveyed land, and that there is no evidence to show that McRae’s settlement was prior to that time.”

To which the defendant then and there duly excepted.

XLII.

Said Circuit Court erred upon the trial of said cause in instructing the jury as follows:

“Now, in this, as in all cases, it is the duty of a party to reduce his damages as much as can reasonably be done under the circumstances, and therefore, if you believe from the testimony that after this timber had been burned, it could have been disposed of by the Government officials for any sum—according to what sum it could have been disposed of, if it had an opportunity to sell it—it was, I think, its duty to have done so and thus reduced the damages, but in determining that question, and in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of this timber; whether they had an opportunity to sell it; whether they could have disposed of it, and all the circumstances that surrounded the location and condition of this particular timber now in controversy. If these people could have sold this timber—if there was a market for it and they could have sold it and gotten something for it—it was their duty to do so and reduce the damages. If, on the other hand, they

could not sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire."

To which instruction the defendant then and there duly excepted.

Said Circuit Court erred particularly in instructing the jury as follows:

"And in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of this timber."

To which the defendant then and there duly and particularly excepted.

Said Circuit Court erred particularly in giving that portion of said instruction as follows:

"If there was a market for it and they could have sold it and gotten something for it—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, there was no market for it, and no opportunity to sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire."

XLIII.

Said Circuit Court erred upon the trial of said cause in rendering said judgment in favor of the plaintiff and against the defendant, on March 29, 1910, for \$4,422.38, with legal interest thereon from said date at six per cent, and the costs and disbursements taxed at \$724.21, or in rendering any judgment in favor of the plaintiff and against the defendant.

XLIV.

Said Circuit Court erred in refusing to set aside said verdict and Judgment, on November 9, 1910, and in refusing to grant a new trial to defendant.

Wherefore, the defendant prays that the judgment of the Court may be reversed, and that said Circuit Court be directed to dismiss the complaint herein, and to enter judgment for defendant for its costs and disbursements.

J. K. WEATHERFORD,

WM. D. FENTON,

BEN C. DEY, and

JAMES E. FENTON,

Attorneys for Defendant.

I certify that the foregoing Assignment of Errors was made in behalf of the defendant above named, for a Writ of Error herein, and is, in my opinion, well taken, and the same now constitutes the Assignment of Errors upon the Writ herein.

WM. D. FENTON.

Due and legal service of the foregoing Assignment of Errors upon me at Portland, Oregon, this 17th day of November, 1910, is hereby admitted.

JOHN McCOURT,

United States Attorney, and Attorney for Plaintiff.

Assignment of Errors. Filed November 18, 1910.

G. H. Marsh, Clerk.

And afterwards, to wit, on Friday, the 18th day of November, 1910, the same being the 41st judicial day of the regular October, 1910, term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 3164.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY,

Defendants.

Order [Allowing Writ of Error, etc.].

On this 18th day of November, 1910, came the defendant above named, by Wm. D. Fenton, one of its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error and assignment of errors intended to be urged by it, and praying also that a transcript of record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does hereby allow a writ of error upon the defendant giving bond according to law in the sum of Ten Thousand Dollars, which shall operate as a supersedeas bond.

Dated this 18th day of November, 1910.

CHAS. E. WOLVERTON,

Judge.

Order. Filed November 18, 1910. G. H. Marsh,
Clerk.

And afterwards, to wit, on the 18th day of November, 1910, there was duly filed in said court, a Bond on Writ of Error, in words and figures as follows, to wit:

[Bond.]

*In the Circuit Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY,

Defendant.

Know All Men by These Presents, That we, the Corvallis and Eastern Railroad Company, as principal and National Surety Company of New York, as surety, are held and firmly bound unto the United States in the sum of Ten Thousand Dollars to be paid to the said United States, for which payment well and truly to be made we bind ourselves and our suc-

cessors jointly and severally by these presents.

Sealed with our seals this 16th day of November,
A. D. 1910.

Whereas, lately at a Circuit Court of the United States for the District of Oregon, in an action pending in said court, between the United States, plaintiff, and Corvallis and Eastern Railroad Company, defendant, a judgment was rendered against said defendant for the sum of Four Thousand Four hundred and Twenty-two Dollars and Thirty-eight cents (\$4,422.38), and legal interest thereon at six per cent per annum from March 29, 1910, and the further sum of Seven Hundred and Twenty-four Dollars and Twenty-one cents (\$724.21) costs and disbursements, and the said Corvallis and Eastern Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforementioned action, and citation having issued directed to the said United States notifying and admonishing the said plaintiff to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, State of California, in said court, on the 6th day of February, 1911.

Now, the condition of the above obligation is such that if the said Corvallis and Eastern Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs, and satisfy said judgment, if it shall fail to make the said plea good, then

the above obligation to be void; otherwise to remain in full force and virtue.

CORVALLIS AND EASTERN RAILROAD
COMPANY,

By J. P. O'BRIEN,
Its President.

Witnesses:

WM. D. FENTON,
N. C. SOULE.

NATIONAL SURETY COMPANY,
By JAS. McL. WOOD,
Its Attorney in Fact.

[Corporate Seal Nat. Surety Co.]

Examined and approved this Nov. 18, 1910.

CHAS. E. WOLVERTON,
Judge.

Bond. Filed November 18, 1910. G. H. Marsh,
Clerk.

And afterwards, to wit, on the 18th day of November, 1910, there was duly filed in said court, a stipulation to send original exhibits to the United States Circuit Court of Appeals for the Ninth Circuit, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY,

Defendant.

Stipulation [Re Original Exhibits].

It is hereby stipulated by and between the plaintiff and defendant above named, by their respective attorneys, that all original exhibits introduced and admitted in evidence in the above-entitled cause shall be certified by the clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit, and that the same shall be deemed a part of the Bill of Exceptions in said cause, and of the Transcript of Record, and that an order of this Court to that effect may be made thereon.

JOHN McCOURT,
United States Attorney, and Attorney for Plaintiff.

J. K. WEATHERFORD,

BEN C. DEY,

JAMES E. FENTON, and

WM. D. FENTON,

Attorneys for Defendant.

Dated Nov. 18th, 1910.

Stipulation. Filed Nov. 18, G. H. Marsh, Clerk
U. S. Circuit Court, District of Oregon.

And afterwards, to wit, on Friday, the 18th day of November, 1910, the same being the 41st judicial day of the regular October, 1910, term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the
District of Oregon.*

No. 3164.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CORVALLIS AND EASTERN RAILROAD
COMPANY,

Defendant.

Order [Directing Certification of Original Exhibits].

On stipulation of parties filed herein, IT IS ORDERED that all original exhibits offered and admitted in evidence in the above-entitled cause shall be certified by the clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit, and the same considered a part of the Bill of Exceptions and Transcript in said cause.

CHAS. E. WOLVERTON,

Judge.

Dated Nov. 18th, 1910.

Order. Filed November 18, 1910. G. H. Marsh,
Clerk.

[Certificate of Clerk U. S. Circuit Court to Record.]

United States of America,

District of Oregon,—ss.

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error and in obedience

thereto, do hereby certify that the foregoing pages, numbered from three to 343, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The United States of America, Plaintiff and Defendant in Error, against the Corvallis and Eastern Railroad Company, Defendant and Plaintiff in Error, as the same may appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is Two Hundred and Twenty-three 70/100 Dollars, and that the same has been paid by said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 13th day of December, 1910.

[Seal]

G. H. MARSH,
Clerk.

[Endorsed]: No. 1926. United States Circuit Court of Appeals for the Ninth Circuit. The Corvallis and Eastern Railroad Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Oregon.

Filed December 16, 1910.

F. D. MONCKTON,
Clerk.



APPROXIMATE STARTING PLACE OF FIRST FIRE

BOUNDARY OF NATIONAL FOREST

UNITED STATES LAND

PATENTED LAND

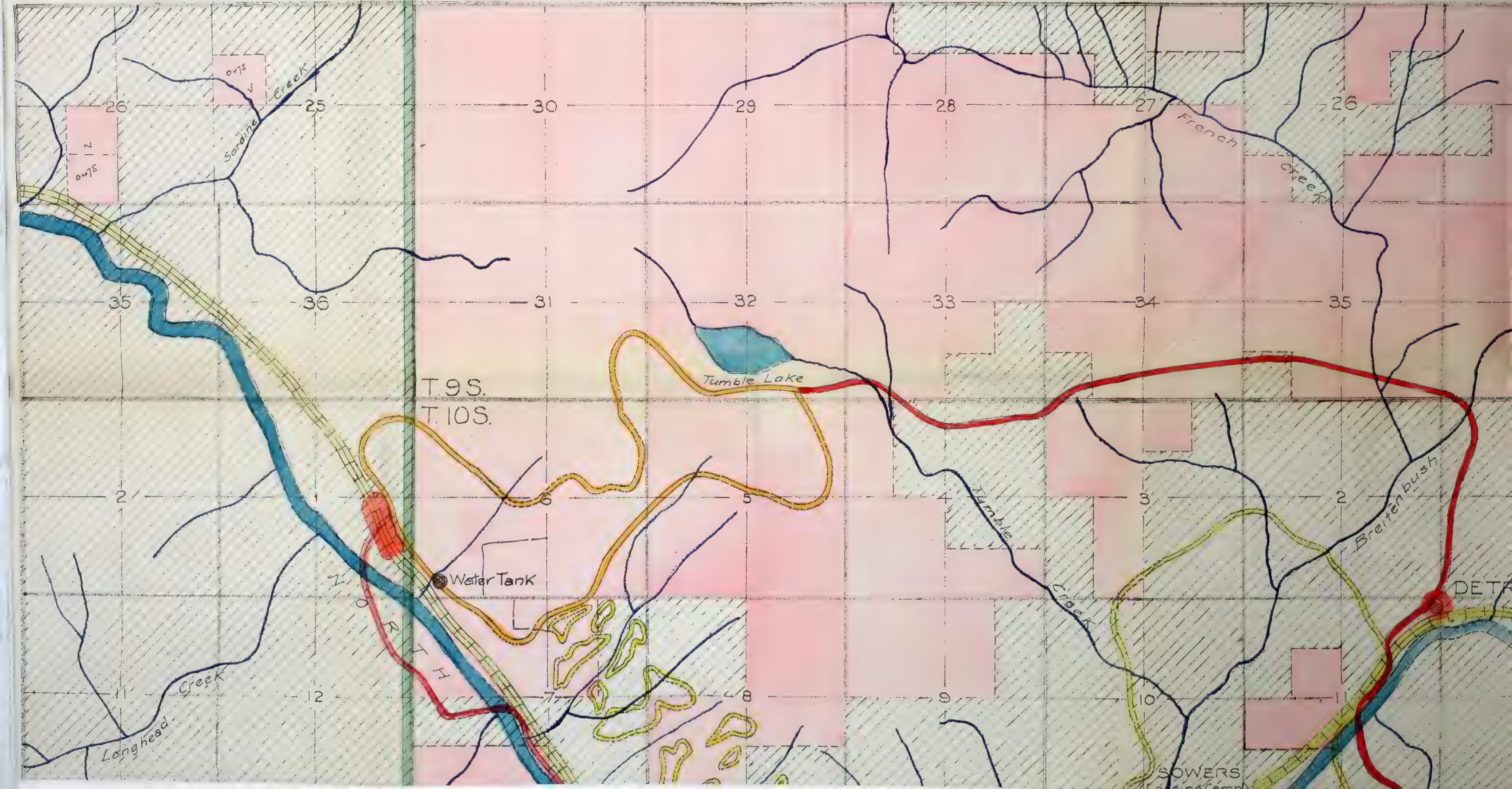
BOUNDARY OF SARDINE-MT. FIRE

BOUNDARY OF TIMBER KILLED BY BERRY

BOUNDARY OF SURFACE FIRE - BERRY

R. 4 E.

R. 5 E.



STARTING PLACE OF FIRST FIRE

- BOUNDARY OF SARDINE MT. FIRE
- BOUNDARY OF TIMBER KILLED BY BERRY FIRE
- BOUNDARY OF SURFACE FIRE - BERRY FIRE

R. 5 E.

DISTRICT OF OREGON?

I hereby certify that the attached exhibit is the original Exhibit No. 1, introduced in evidence by the plaintiff in Cause No. 3164, The United States, vs. Corvallis and Eastern Railroad Co. in the Circuit Court of the United States for the District of Oregon, and certified to the United States Circuit Court of Appeals pursuant to the order of said Circuit Court of the United States for the District of Oregon.

In Testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Portland, in said District of Oregon, this 13th day of December, 1910.

Seal.

R. 6 E.

E. J. Marsh Clerk.

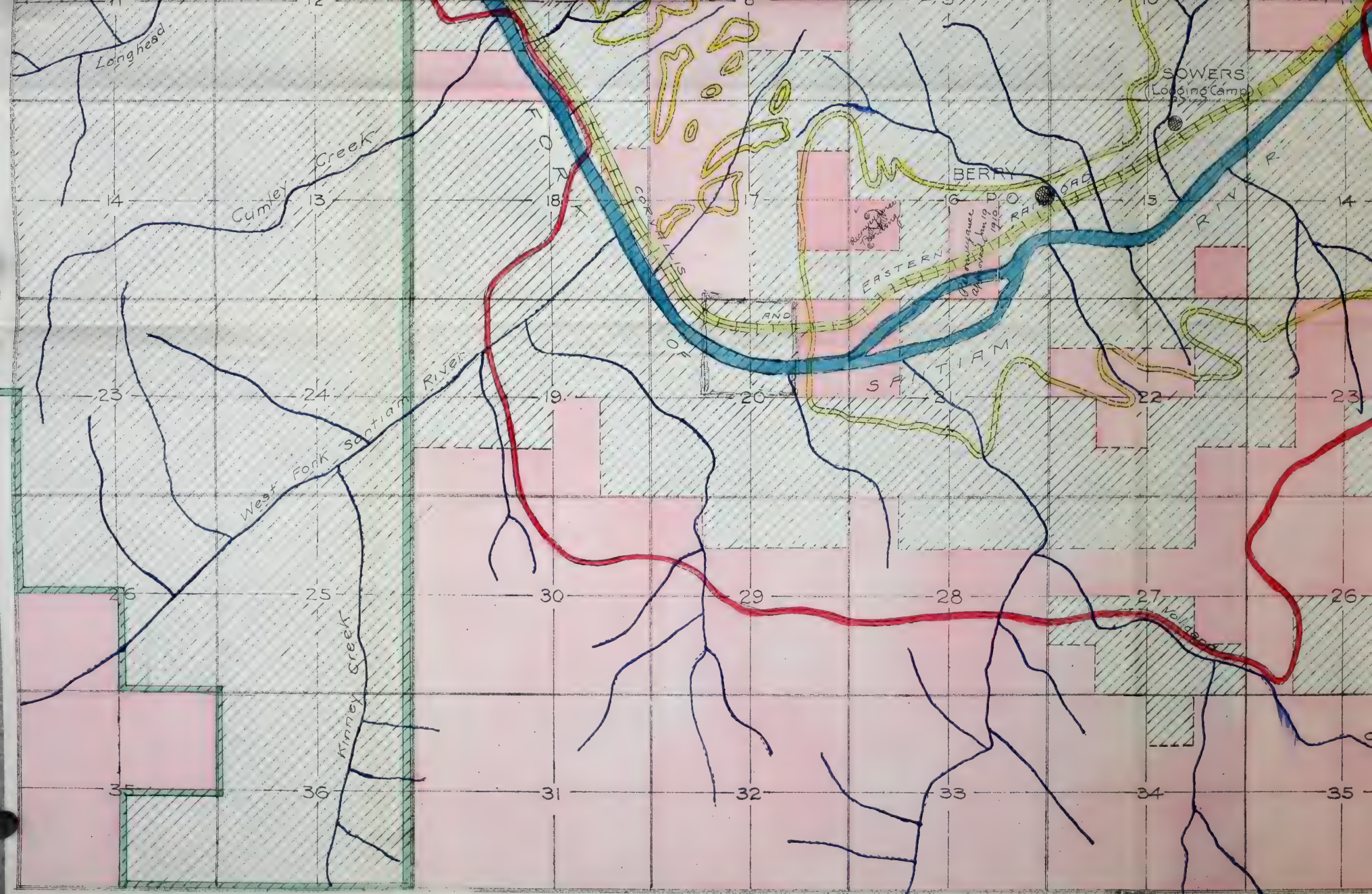


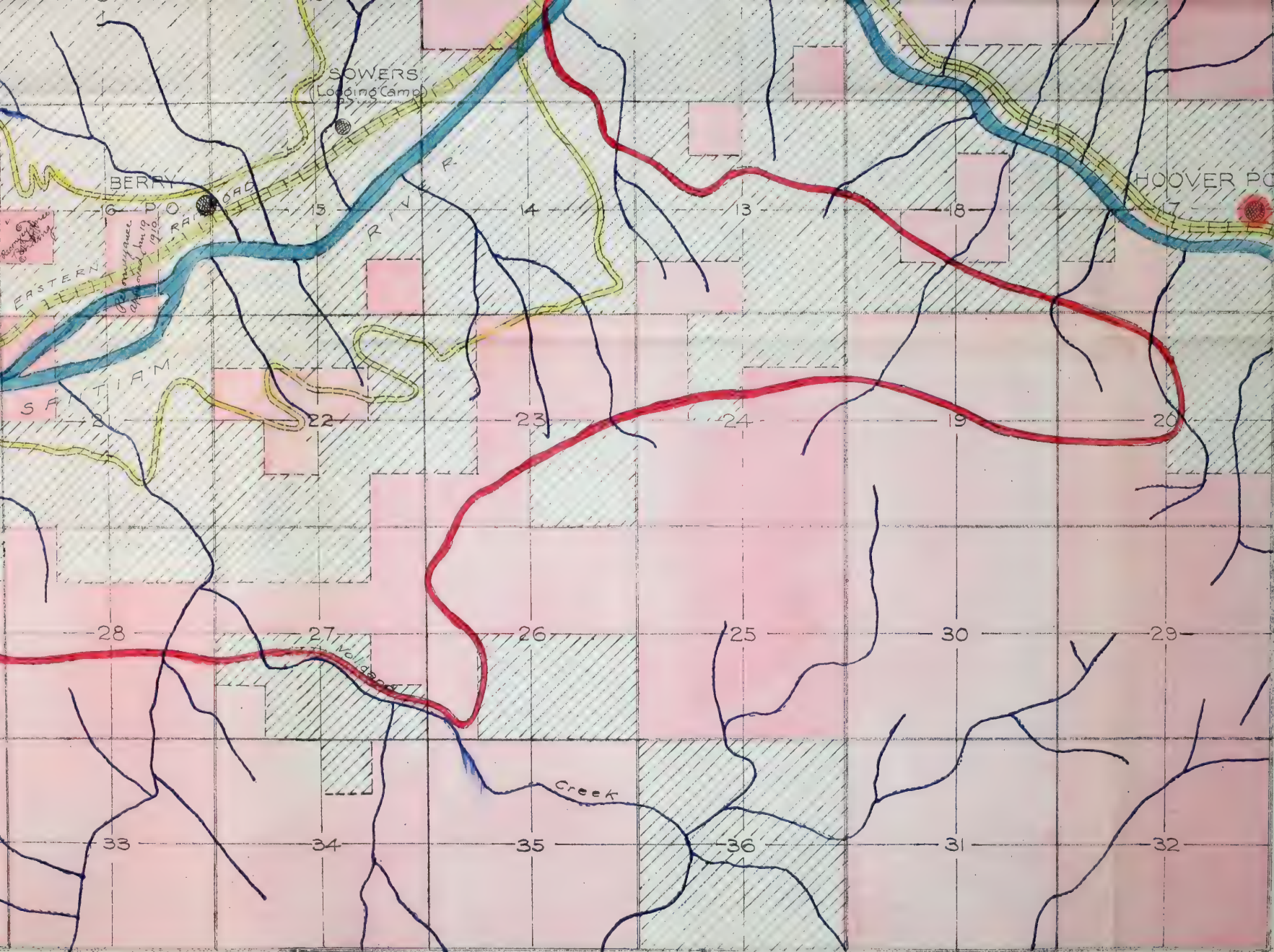
U.S. CIRCUIT COURT
FILED
MAR 29 1910
E. J. Marsh
DISTRICT OF OREGON

Copy to

No. 3164. U.S. vs. C. & E. R. Co.

Case No. 1926
U.S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
PLAINTIFFS EXHIBIT No. 1
Received, DEC. 16, 1910.
F. D. MONGKTON, Clerk.





WILLAMETTE VALLEY & COAST R.R.

LINE OF ROUTE

Revised and Re-established
from

Naquina Eastward.

Section 8.
Mile 131 to 141

Scale, 40 Ch. = 1 In.

This is the Map
of A. B. referred to in the affidavit
of J. M. Stewart sworn before me
on the 5th day of February 1891.
J. B. Harrison
Notary Public for Oregon

This is the Map A. B. referred to in
an affidavit sworn this day.

J. M. Stewart

Witness 6th 1891.



Com. and
Railro

I hereby certify that the above is a true and correct copy of the original of Exhibit No. 2, in Case No. 3164, The Union Pacific R.R. Co., in the Circuit Court of Oregon and of the appeals pursuant to the Statutes for the District of Oregon. In Testimony whereof I have hereunto set my hand and affixed the seal of the District Court of Oregon, at Portland, Oregon, this 14th day of February, 1891.

Seal
affix
Dist

Corvallis and Eastern Railroad Co.
Railroad - 1-5-1910
Exhibit 1

U. S. CIRCUIT COURT
DISTRICT OF OREGON

MAR 29 1910

J. W. Marshall, Clerk
DISTRICT OF OREGON

Case No 1926.

U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EXHIBIT No 2

Received Dec 16 1910.

W. D. MONROTON, Clerk

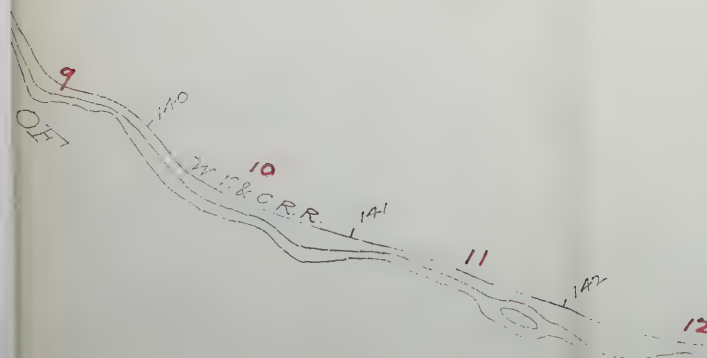
DISTRICT OF OREGON, ss.

I hereby certify that the attached exhibit is the original
Exhibit No 2, introduced in evidence by the Plaintiff in the case
No 3164, The United States, vs. Corvallis and Eastern Railroad
Co., in the Circuit Court of the United States for the District
of Oregon, and certified to the United States Circuit Court of
appeals pursuant to the order of said Circuit Court of the United
States for the District of Oregon.

In Testimony whereof, I have hereunto set my hand and
Seal) affixed the Seal of said Court, at Portland, in said
District of Oregon, this 13th day of December, 1910.

J. W. Marshall

Clerk



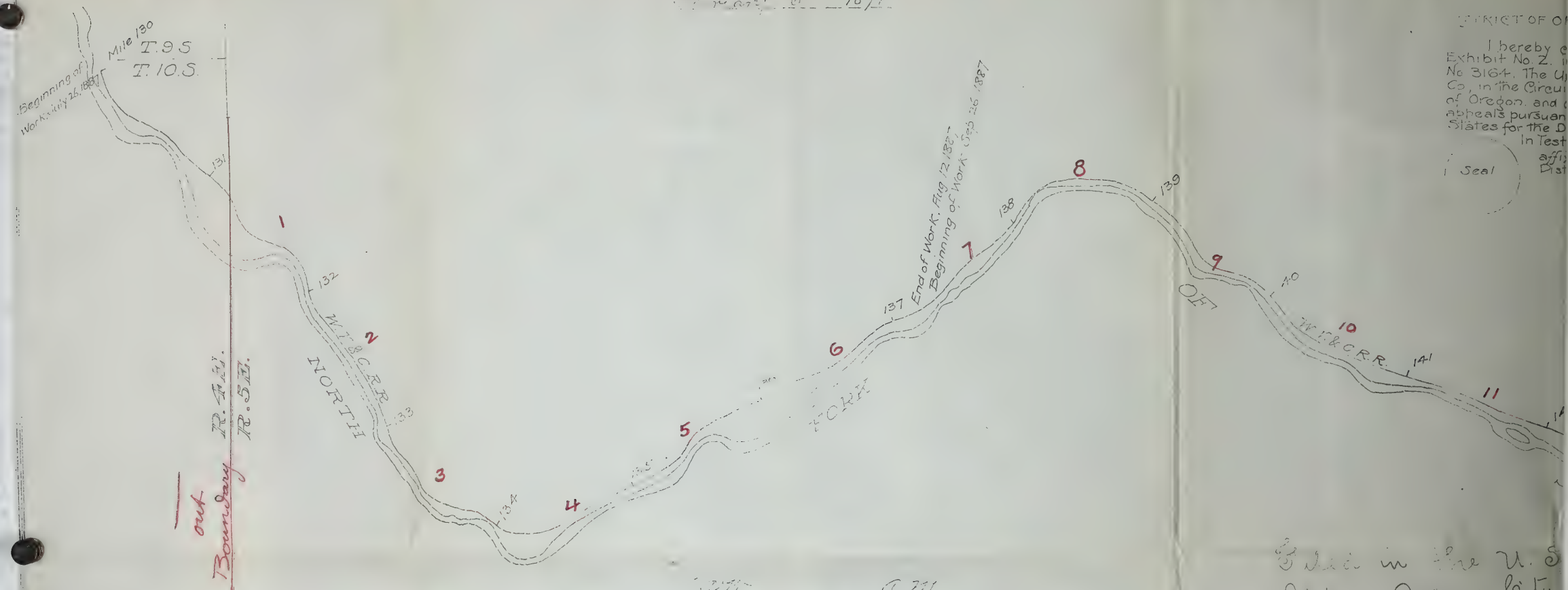
January 6th 1891

J. M. Stewart

DISTRICT OF OREGON

I hereby certify
Exhibit No. 2. U.
No 3164. The U.
Co., in the Circuit
of Oregon, and
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and 20 of the interior.

Feb. 20, 1891.

Approved subject to all
united existing rights.

J. M. Chandler
Acting Secretary.

Filed in the U. S.
Office, Oregon City.
February 7, 1891

JUDGE OF ORIGIN 7 ss.

I hereby certify that the attached exhibit is the original Exhibit No. 2, introduced in evidence by the plaintiff in the case No. 3164, The United States vs. Corvallis and Eastern Railway Co., in the Circuit Court of the United States for the District of Oregon, and certified to the United States Circuit Court of Appeals pursuant to the order of said Circuit Court of the United States for the District of Oregon.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Portland, in said District of Oregon, this 13th day of December, 1910.

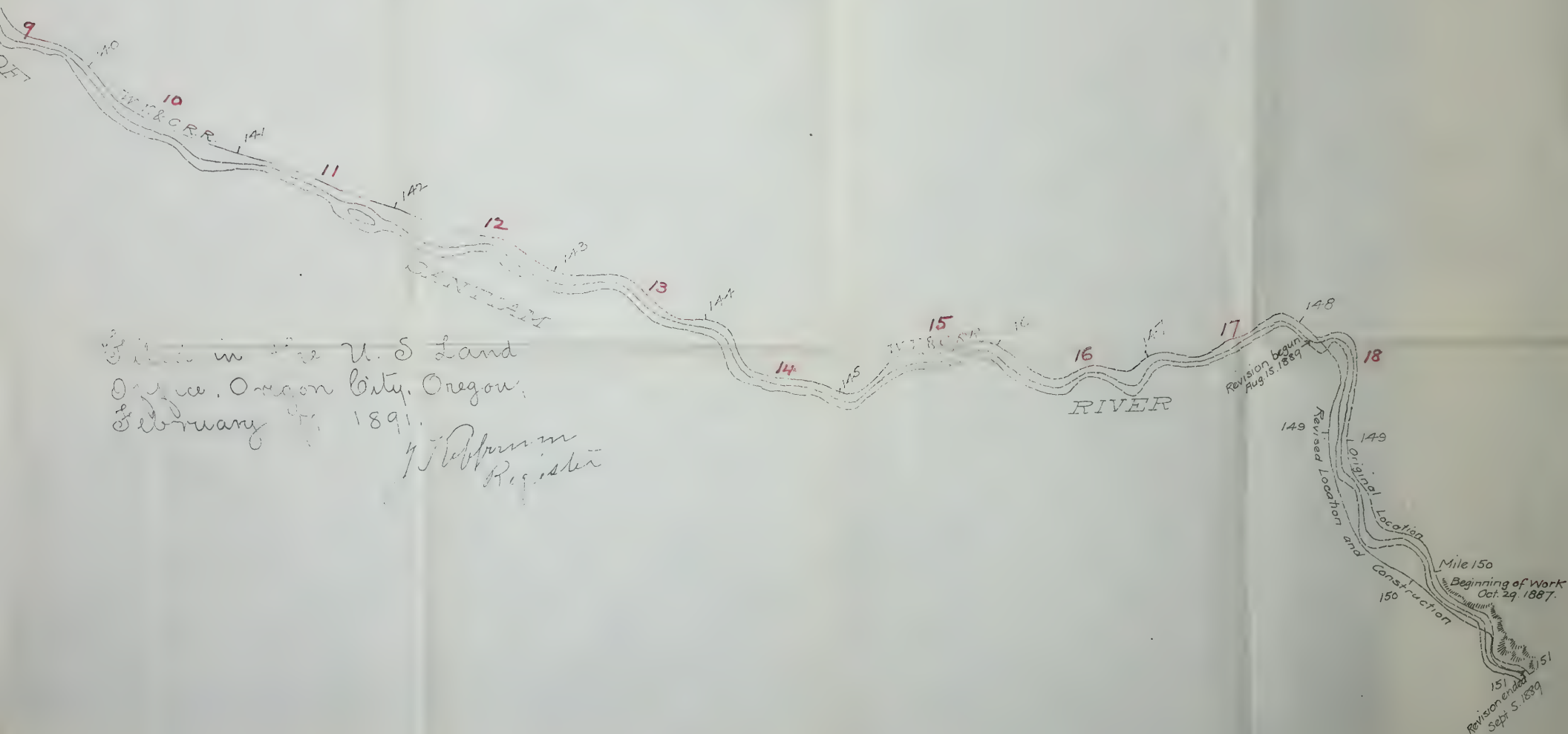
Seal

William L.

Clerk

Filed in the U. S. Land
Office, Oregon City, Oregon,
February 4, 1891.

*William
Register*



Plaintiff's Exhibit 3.

Refer in reply 5116
to this initial: ———
F 2

C. J. R
W. C. E

5/24 Recd. 2:45 P. M.

1891

34545

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.

Washington, D. C., May 18, 1891.

Register and Receiver,
Oregon City, Oregon.

Gentlemen:

You are advised that on April 29, 1891, the Hon. Acting Secretary of the Interior approved a map filed by the Willamette Valley and Coast R. R. Co. under the provisions of the right of way act of Mar. 3, 1875, showing the definite location of said Company's road from a point about $\frac{3}{4}$ of a mile south and $\frac{1}{8}$ of a mile west of the N. E. corner of Town. 10 S., Range 4 E. Willamette Meridian, Oregon, in an unsurveyed section, to a point in the valley of the North Fork of the Santiam River, a distance of 20 miles.

I transmit herewith, a copy of said map, upon receipt of which you will proceed under the usual instructions in such cases.

Very respectfully,

W. M. STONE,
Acting Commissioner.

Plaintiff's Exhibit 3—Continued.

State of Oregon,
County of Benton,—ss.

J. M. Stewart being duly sworn says that he is the Principal Resident Engineer of the Willamette Valley and Coast Rail Road Company, that the survey of the line of route of said road from a point about three-fourths of a mile south and one-eighth of a mile West of the North East corner of Township 10 South, Range 4 East, Willamette Meridian, in an unsurveyed section to a point in the valley of the North Fork of the Santiam River, being a distance of twenty miles, was made by him as such Engineer of the company and under its authority, commencing on the 15th day of August, 1889, and ending on the 5th day of September, 1889, and such survey is accurately represented on the accompanying map marked A. B.

J. M. STEWART,
Resident Engineer Willamette Valley and Coast
Railroad Company.

Subscribed and sworn to before me this 6th day of
February, A. D. 1891.

[Seal] J. R. BRYSON,
Notary Public for Oregon, Residing at Corvallis,
Oregon.

Plaintiff's Exhibit 3—Continued.

I, William M. Hoag, do hereby certify that I am the First Vice President of the Willamette Valley and Coast Railroad Company, that J. M. Stewart, who subscribed the foregoing affidavit, is the princi-

pal Resident Engineer of the said Company. That the survey of line of route of the Company's road as accurately represented on the accompanying map, was made under authority of the Company, that the said line of route so surveyed and as represented on the said map, was adopted by the Company by resolution of its Board of Directors on the sixth day of February, 1891, as the definite location of the road, from a point about three-fourths of a mile South and one-eighth of a mile West of the North East Corner of Township 10 South, Range 4 East of Willamette Meridian, in an unsurveyed section to a point in the Valley of North Fork of the Santiam River, being a distance of twenty miles, and the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the Company may obtain the benefits of the Act of Congress approved March 3rd, 1875, entitled An Act Granting to Railroads the right of way through the public lands of the United States.

WM. M. HOAG,
First Vice-president Willamette Valley & Coast
Railroad Company.

[Seal] ZEPHIN JOB,
Secretary Willamette Valley & Coast Railroad Com-
pany.

Dated at Corvallis, Oregon, this 6th day of February, 1891.

[Endorsed]: No. 3164. U. S. vs. C. & E. R. R. Co.
U. S. Circuit Court. Filed Mar. 29, 1910. G. H.
Marsh, Clerk. District of Oregon.

[Endorsed]: Case No. 1926. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 3. Received Dec. 16, 1910. F. D. Monckton, Clerk.

District of Oregon,—ss.

I hereby certify that the attached exhibit is the original Exhibit No. 3 introduced in evidence by the plaintiff in cause No. 3164, The United States vs. Corvallis and Eastern Railroad Co., in the Circuit Court of the United States for the District of Oregon, and certified to the United States Circuit Court of Appeals pursuant to the order of said Circuit Court of the United States for the District of Oregon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District of Oregon, this 13th day of December, 1910.

[Seal]

G. H. MARSH,
Clerk.

[Plaintiff's Exhibit No. 4.]

Special Priv.

C. & E. R. R.

Portland, Oregon, April 24, 1906.

Mr. John A. Shaw,

Secy., Corvallis & Eastern R. R.,

Albany, Oregon.

Dear Sir:

Your right of way through the Cascade Forest Reserve in T. 10 S., R. 5 E. is reported by Ranger Harry G. Hayes as being in a very dangerous condition as regards brush, debris, rotting logs and ties,

and is a menace to valuable timber owned by the Government on account of the liability of a spark from an engine starting a fire in this inflammable material which might result in great damage to other property by the spreading of forest fires thus started, in the dry season.

I enclose a copy of his report made after making a personal examination, and also a few kodack prints taken by him to verify his statements.

In view of this dangerous condition of your right of way, I will ask you to take measures as soon as possible to clean up this right of way, and until this is accomplished, during the dry season to maintain a fire patrol after each train.

While such action on your part cannot be compelled under the present State or Federal laws, yet it
Mr. John A. Shaw—2—

would seem advisable for you to attend to this matter, both on account of the general good that would be accomplished by removing this danger to all property within a considerable distance of your line and also for your own protection, as it is the opinion of the Assistant United States Attorney that damages could be collected for property destroyed through your neglect in leaving this inflammable material on your right of way, and thus producing a menace to nearby property.

I enclose copy of the opinion of the Assistant United States Attorney in this matter.

If this right of way is not cleaned up by you in a thorough manner, and if a fire is started on account of neglect in not burning this debris, etc., resulting in

damage to Government timber, the Government will, at once, take measures to recover full damages, on the grounds that the damage was caused by negligence on your part in allowing your right of way to be covered with inflammable material, which was a menace to the property of others.

Very truly yours,

(Signed) D. D. BRONSON,

Forest Inspector.

3 Enclosures.

[Endorsed]: No. 3164. U. S. vs. C. & E. R. R. Co. U. S. Circuit Court. Filed Mar. 29, 1910. G. H. Marsh, Clerk. District of Oregon.

[Endorsed]: Case No. 1926. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 4. Received Dec. 16, 1910. F. D. Monckton, Clerk.

District of Oregon,—ss.

I hereby certify that the attached exhibit is the original Exhibit No. 4 introduced in evidence by the plaintiff in cause No. 3164, The United States vs. Corvallis and Eastern Railroad Co., in the Circuit Court of the United States for the District of Oregon, and certified to the United States Circuit Court of Appeals pursuant to the order of said Circuit Court of the United States for the District of Oregon.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Portland,

in said District of Oregon, this 13th day of December, 1910.

[Seal]

G. H. MARSH,
Clerk.

[Plaintiff's Exhibit No. 5.]

[Letter-head of Hammond Lumber Company.]

Received 4/27/06.

Spec Privm.

C. & E. R. R.

April 26, 1906.

Mr. Daniel D. Bronson,
Forest Inspector,
Custom House, City.

Dear Sir:

Yours of the 24th inst. to hand relative to the condition of the right of way of the Corvallis & Eastern R. R. in Township 10 South, Range 5 East. I have sent the correspondence to Mr. J. K. Weatherford, Vice President of the company, who will take the matter up with our Superintendent.

I will advise you as soon as possible in regard to what they will do relative to cleaning up the right of way.

Yours truly
JOHN A. SHAW.

418 *The Corvallis and Eastern Railroad Company*

[Figures appearing on reverse side:]

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[Endorsed]: No. 3164. U. S. vs. C. & E. R. R. Co.
U. S. Circuit Court. Filed Mar. 29, 1910. G. H.
Marsh, Clerk. District of Oregon.

[Endorsed]: Case No. 1926. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 5. Received Dec. 16, 1910. F. D. Monckton, Clerk.

District of Oregon,—ss.

I hereby certify that the attached exhibit is the original Exhibit No. 5 introduced in evidence by the plaintiff in cause No. 3164, The United States vs. Corvallis and Eastern Railroad Co., in the Circuit Court of the United States for the District of Oregon, and certified to the United States Circuit Court of appeals pursuant to the order of said Circuit Court of the United States for the District of Oregon.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District of Oregon, this 13th day of December, 1910.

[Seal]

G. H. MARSH,
Clerk.

2
No. 1926

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE CORVALLIS AND EASTERN
RAILROAD COMPANY (a Cor-
poration),

Plaintiff in Error,

VS.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States Circuit Court for
the District of Oregon.

WM. D. FENTON,
J. K. WEATHERFORD,
BEN C. DEY, and
JAMES E. FENTON,
Attorneys for Plaintiff in Error.

FILED

FEB 1 - 1911

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE CORVALLIS AND EASTERN
RAILROAD COMPANY (a Cor-
poration),

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

This is an action brought by the United States, the defendant in error, against the Corvallis and Eastern Railroad Company, plaintiff in error, to recover damages alleged to have been suffered and sustained by reason of the negligence of the plaintiff in error. For convenience, the plaintiff in error will be hereafter designated under the name of Railroad Company, and the defendant in error under the name of United States.

It is charged in the complaint that the Railroad

Company was negligent in two particulars: *First.* It is alleged that the Railroad Company, on and prior to the 23rd day of July, 1906, carelessly and negligently failed and neglected to remove from its right of way where the same traverses and passes through the timber land in the State of Oregon belonging to and adjacent to lands belonging to the United States commonly known as the Cascade Forest Reserve, debris and inflammable material consisting of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter, and carelessly and negligently failed and neglected to keep its said right of way in said places clear of such trees, logs, grass and old ties and dead and dry vegetable matter, and carelessly and negligently permitted and allowed large quantities of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter to accumulate along the right of way of said Railroad Company's railroad where the same traversed and passed through said tracts of timber land, and that by reason of such negligence a fire communicated from one of the Railroad Company's engines into the said inflammable and combustible material on the said right of way, and from there spread into the said Forest Reserve and burned and destroyed the timber of the United States on and within the same. *Second.* It is alleged that the Railroad Company was negligent and careless in equipping its engines or in equipping the engine which it used upon its road along and

through the said Forest Reserve; and it is alleged that the Railroad Company carelessly and negligently permitted and allowed its engine to be out of repair, and negligently and carelessly failed and neglected to equip said engine with spark arresters and apparatus to prevent the escape of sparks, cinders, coal, and fire, and carelessly and negligently placed said engine in charge of and in control of unskilled employees and servants, and that by reason of said carelessness and negligence of said Railroad Company in failing and neglecting to remove from its track and right of way, and to keep the same free and clear of dead and dry trees, logs, grass, old ties, and other dead and dry vegetable matter, and by reason of the accumulation thereof upon its track and right of way, and the careless and negligent management and operation of its said engine, and in carelessly and negligently permitting said engine to be out of repair, and carelessly and negligently failing to equip said engine with apparatus to prevent the escape of fire, sparks and cinders, it scattered large quantities of sparks, fire and burning cinders upon and along said railroad track and right of way of the said railroad, and started a fire upon said right of way, which fire spread from said right of way to and upon the tracts of timber land owned by and belonging to the United States, and burned and destroyed 200,000 feet, board measure, of merchantable timber belonging to the United States, of the reasonable value of \$100.00, and that because of the said

fire, the United States was put to a great expense in fighting the same and keeping said fire from spreading and destroying other valuable timber belonging to the United States, in the amounts as follows, to-wit: extra labor, \$619.25; transportation and travel, \$7.30; supplies and tools, \$95.99,— and that thereby the United States suffered damages in the total sum of \$822.54.

There are two causes of action alleged in the complaint. Both are based upon the same charges of negligence, but refer to fires occurring at different times. The first cause of action is based upon a fire alleged to have occurred about the 23rd day of July, 1906. The second cause of action is based upon a fire alleged to have occurred on the 11th day of August, 1906; in the second cause of action the United States claims damages in the sum of \$9,880.90, which includes the value of the timber alleged to have been destroyed, and the cost and expense incurred by the United States in extinguishing said fire and preventing its spread.

The Railroad Company, by its answer, denies the negligence charged in the complaint, and for a further and separate answer and defense to the first cause of action set out in the complaint, alleges:

That on the 23rd day of July, 1906, and for a long time prior thereto, the Railroad Company was using only one engine on the railroad of said company along the line of its road mentioned and referred to in the complaint, which said engine made one

trip daily from Albany to Detroit and return, arriving at Detroit about the hour of 12 o'clock M., and leaving Detroit about 1 o'clock P. M.; that said engine was in charge of a careful, capable, skillful and prudent engineer together with a careful, capable and skillful fireman who were operating and did operate said engine on said day and at all times before and after, in a careful, skillful and prudent manner; that at said time and for a long time prior to said time said engine was furnished with the most approved spark arresters known and in practical use, provided with wire screens, and the same were in perfect order and so managed that no sparks could or did pass through the screens or spark arresters, and that said engine was supplied with coal-boxes or ash-pans of the most approved pattern and the one in general use on railroad engines used for like purposes, and that said coal-box or ash-pan was in perfect condition, and that the fire mentioned in the complaint could not, and did not, originate from the sparks emitting from the said engine, or from the coal-box or ash-pan, or from coals being dropped by said engine through the coal-box or ash-pan attached thereto.

And the Railroad Company, for a second and further answer to the first cause of action set out in the complaint, alleges that the fire mentioned and described in the complaint as having occurred on the 23rd day of July, 1906, did not start or originate on the right of way of the Railroad Company, but started upon lands outside of and away

from its said right of way, and upon lands that did not belong to the Railroad Company, and it is alleged that said fire originated in and near a cabin a short distance from the right of way of the Railroad Company, which said cabin was frequently used by persons hunting and fishing, for camping purposes, and that the same had been so used immediately before the fire mentioned in the first cause of action set out in the complaint.

The Railroad Company, for a further and separate answer to the second cause of action set out in the amended complaint, sets up the same facts as in the first further and separate answer to the first cause of action set out in the amended complaint, and for a second further and separate answer to the second cause of action set out in the amended complaint, the Railroad Company alleges that where said fire started on or about the 11th day of August, 1906, a smoldering fire had been burning in some old logs some distance from the right of way, and had been emitting smoke therefrom for several days prior to the said 11th day of August, 1906, and that said fire originated from said smoldering fire in said dead logs that had been ignited on the 23rd day of July, 1906, which said fire had not been extinguished; that said fire of August 11, 1906, did not originate upon the right of way of the Railroad Company, or near the same, or from any sparks emitted from its said engine or from any coals dropped through its ash-pan, or

from any other cause connected with its said engine or train.

The United States, replying to the affirmative matter set up by the Railroad Company in its answer, denies each and every allegation thereof.

Upon the issues thus made, the trial of this case was begun before the court and jury on the 21st of March, 1910, and continued from day to day until the 29th day of March, 1910, when the jury in said cause returned a verdict in favor of the United States and against the Railroad Company for the sum of \$4,422.38, and on the same day a judgment was rendered upon said verdict, in favor of the the United States and against the Railroad Company, for the said sum of \$4,422.38, together with costs and disbursements, taxed at \$724.21.

On October 3, 1910, and within the time allowed by law and the orders of the Court, the Railroad Company duly filed its motion for a new trial, which was overruled on November 9, 1910.

On the 9th day of November, 1910, and within the time allowed by law and the orders of the trial court, the Railroad Company tendered its Bill of Exceptions, and the same was then settled and allowed and made a part of the record in this cause.

On the 18th day of November, 1910, the Railroad Company duly served and filed its petition for a writ of error, and therewith its Assignment of Errors, and on the same date a writ of error in said cause was duly issued. The Railroad Company, upon its writ of error, relies upon the following

assignment of errors, which, for convenience and to prevent confusion, will be numbered the same as in the Transcript of Record.

ASSIGNMENT OF ERRORS.

XVI.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to offer, and in admitting in evidence, over the objection and exception of defendant that the same was incompetent and immaterial and a self-serving declaration, Exhibits 4 and 5, as follows, to-wit:

EXHIBIT 4.

“Portland, Oregon, Apr. 24, 1906.

“Mr. John A. Shaw,

Sec’y Corvallis & Eastern R. R.

Albany, Oregon.

Dear Sir:

Your right of way through the Cascade Forest Reserve in T. 10 S. R., 5 E. is reported by Ranger Harry G. Hayes as being in a very dangerous condition as regards brush, debris, rotting logs and ties, and is a menace to valuable timber owned by the Government on account of the liability of a spark from an engine starting a fire in this inflammable material which might result in great damage to other property by the spreading of forest fires thus started, in the dry season.

I enclose a copy of his report made after making a personal examination, and also a few kodak prints taken by him to verify his statements.

In view of this dangerous condition of your right of way, I will ask you to take measures as soon as possible to clean up this right of way, and until this is accomplished, during the dry season to maintain a fire patrol after each train.

While such action on your part cannot be compelled under the present State or Federal laws, yet it would seem advisable for you to attend to this matter, both on account of the general good that would be accomplished by removing the danger to all property within a considerable distance of your line, and also for your own protection, as it is the opinion of the Assistant United States Attorney that damages could be collected for property destroyed through your neglect in leaving this inflammable material on your right of way, and thus producing a menace to nearby property.

I enclose copy of the opinion of the Assistant United States Attorney in this matter.

If this right of way is not cleaned up by you in a thorough manner, and if a fire is started on account of neglect in not burning this debris, etc., resulting in damage to Government timber, the Government will at once take measures to recover full damages, on the grounds that the damage was caused by negligence on your part in allowing your right of way to be covered with inflammable material, which was a menace to the property of others.

Very truly yours,

(Signed) D. D. Bronson, Forest Inspector."

3 enclosures.

EXHIBIT 5.

"April 26, 1906.

"Mr. Daniel D. Bronson,
Forest Inspector,
Customs House, City.

Dear Sir:

Yours of the 24th inst. to hand relative to the condition of the right of way of the Corvallis & Eastern R. R. in Township 10 South, Range 5 East. I have sent the correspondence to Mr. J. K. Weatherford, Vice President of the company, who will take the matter up with our Superintendent. I will advise you as soon as possible in regard to what they will do relative to cleaning up the right of way.

Yours truly,

John A. Shaw."

(Transcript of record, pp. 380-382.)

XIX.

Said Circuit Court erred upon the trial of said cause in permitting the witness Jacob Merle to testify over the objection and exception of defendant that the same was incompetent and immaterial, and in refusing to strike out said testimony for the reason that the same was incompetent and immaterial, which testimony is as follows:

"Q. Will you please state the condition you found that engine in after the July 23rd fire, pursuant to the report made to you?

A. After the engine was reported, I examined the netting and stack; I told them it was pretty hot yet to examine—

Q. Never mind what you told them. Tell the jury what you found.

A. I got up and examined the engine with a torch. It was so hot you could not get in there, and the engine had to be used the next morning, and with a torch I could not see anything in the stack, because it was too hot to get your head down in there. I waited until about eight o'clock, trying to find the master mechanic, to report to him what had happened; and they asked me if I could see anything. I told them no, and they allowed the engine to go out the next day."

Whereupon said witness further testified as follows:

"They had to work at it the following day, and concluded to hold the engine and take the stack off the engine, and the barrel of the stack of this engine stands up maybe two feet on the inside, cannot tell how many inches, could figure it out on a blue print map; it had no hole out in the bottom of the barrel of the stack to allow cinders to go into the smoke-box; the base of the stack to the top of the barrel was full of cinders, and they were hot; he got down on the floor and took all these cinders out; searched the netting and could not find anything wrong with the netting; held the smokestack there all that day until late in the evening, waiting for the master mechanic to come and look at it himself, to see if he could see anything wrong with it; he didn't come, and about 7 o'clock that night he had the stack on, and told them, and let the engine go out; it went out a few days, and he had to look at it again—complaint made of the engine again; they concluded to take stack off and put

another one on, and they did so, and shortly after this other engine that had this stack, it was reported, and he got up on this engine and looked at the stack, and found between the casting of the trap-door, where the man that had put the netting in didn't have material enough to reach over to the flange, consequently he could take his rule by opening it two inches single thickness—two foot rule—and put it between the casting and the netting; he went to work and got some pieces of netting—the engine had to be used—and put in three different pieces, he thinks; they have six courses in that or more—the same stack went on the second engine; on that engine at that time he put them in and flanged them out, and that stack was all right after that; consequently he concluded there was trouble with the stack; he had taken that stack down before that and put two holes—had the machinist drill two big holes in the barrel of the stack; first thought that was the cause, and after the holes were cut in, and made the same as the other stacks, there were still complaints made, and after that he located the trouble under that trap-door between the lower casting of the trap-door—the base, and the netting, and he fixed it; was up at Breitenbush Springs after the second fire, talking about it, one thing and another; it was after the second fire that he located that stack, but there was another stack reported on another engine afterwards, on two or three engines that run up there; engine 2 was reported, it had been running up there; engine 1 was reported again, and found in bad condition.”

(Transcript of record, pp. 384-386.)

XX.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to interrogate, and the witness Jacob Merle to testify, over the objection and exception of the defendant that the same was incompetent and not pleaded, as follows:

“Q. Now, on these examinations, what condition did you find the ash-pan of this engine in? That is, the apparatus underneath to—

A. Mr. Walsh had come and asked me to look over the ash-pans at that time, and we found the ash-pan netting—after looking at the stack and everything, he insisted on looking at all the ash-pans; they looked at engine one’s ash-pan and the netting did not come up to the mud rim by two inches—the piece of netting; the ash-pan is maybe eight to ten inches deep, and the netting came—it is bolted on with three bolts on the bottom of the ash-pan, two bolts on the side; there was a space of two inches; he looked through the wheel himself; he insisted on my putting a piece of netting across; we did not bolt it on but sewed it on with wire, and it remained in that way that season.”

(Transcript of record, p. 387.)

XXI.

Said Circuit Court erred upon the trial of said cause in admitting in evidence the testimony of the witness Jacob Merle, over the objection and exception of defendant that the same was incompetent and not pleaded, and in refusing to strike out the same as incompetent and not pleaded, as follows:

“There was nothing between this mud ring and the piece of netting when the damper was open;

when it was shut, the damper was close; there was an aperture for the escape of sparks and coals—you could put your arm through it—the full length of the ash-pan, full width of it; in one corner of that pan the ashes had accumulated all around, they were kind of hot, and it bucked it up; he corked in asbestos, and kind of fixed it down.”

(Transcript of record, pp. 387-388.)

XXII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to interrogate the witness Jacob Merle, and said witness to testify, over the objection and exception of the defendant that the same was incompetent and not within the issues, as follows:

“Q. Now, then, were you an experienced man in the examination and repair of stacks and apparatus?

A. I would like to rectify that statement. I had that door fixed, I didn’t do it myself, I had it fixed, I put it up.”

(Transcript of record, p. 388.)

XXIV.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness Jacob Merle, and said witness to testify, over the objection and exception of the defendant that the same was conjectural, speculative and incompetent, as follows:

“Q. Now, that—how was it that that stack was allowed to get in that condition, then?

A. Having no man detailed to examine the

engines on their arrival on every trip, consequently they were never examined until the engineer reported them.

Q. Reported them how?

A. Reported that there was something wrong with the engines—with the stack.”

(Transcript of record, p. 389.)

XXV.

Said Circuit Court erred upon the trial of said cause in refusing to strike out the testimony of said witness Jacob Merle, hereinafter set out, as tending to show negligence not charged in the complaint, and as incompetent, as follows:

“A. Having no man detailed to examine the engines on their arrival on every trip, consequently they were never examined until the engineer reported them.

Q. Reported them how?

A. Reported that there was something wrong with the engine—with the stack.”

(Transcript of record, p. 389.)

XXXV.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

“The fact, if you so find, that these engines at either of these times or at other times, may have allowed sparks to escape, and that such sparks may have been alive or sufficient to burn the skin of a person who might be riding on the train immediately behind such engine, would not of itself be any evidenc that the defendant was negligent, or that

these spark-arresters or other appliances were defective or out of repair, or that the engine with these appliances was negligently operated. The defendant did not insure that sparks might not escape from its engine in a good state of repair with reasonably safe appliances and operated by reasonably careful and prudent persons in a reasonably careful and prudent manner, and it is only when such sparks are scattered in unusual quantities or of unusual size, that any inference of negligence in that particular can arise or be found by the jury."

(Transcript of record, p. 395.)

XXXVI.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

"I instruct you that under the law and the evidence in this case, the United States, by its officers and agents, had authority to sell this burned timber, either with or without any other timber that might be left standing. If you find from the evidence that if the United States, by its officers and agents in charge, by the exercise of reasonable diligence, could have sold the burned timber and realized therefrom so as to reduce the damage which may have been caused by the fire, then the plaintiff in this case would not be entitled to charge the defendant for any damages which could have been thereby avoided, even though you find that the defendant negligently caused the damages or some portion of the damages claimed on account of either of the fires respectively. By this I mean that if the timber which was burned over could by reason-

able diligence have been sold for as much as the plaintiff claims such timber was worth at the time, and if such sales could have been made within a period of two or three years, and thereby the damages reduced or wholly avoided, then to the extent that the plaintiff could have reduced such damages by such sale, even though it was the full value of such timber, the plaintiff would not now be entitled to charge the defendant therewith."

(Transcript of record, pp. 395-396.)

XXXVII.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant as follows:

"There had been some evidence introduced in this case tending to show what was the market value of this timber at the time it was burned. The market value of this timber is the price which it would bring when it was offered for sale by one who desires to but who is not obliged to sell it, and is bought by one who is under no necessity of having it; and if you find from the evidence that the United States by its forestry officers or other persons having charge of its business, attempted to sell or offered for sale this burned timber at a price beyond its market value, as I have defined it, then the fact that there was no sale under such circumstances would be no evidence that the plaintiff had used reasonable diligence in attempting to make such sale or in attempting to avoid the loss caused by such fire or fires."

(Transcript of record, pp. 396-397.)

XXXVIII.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

“In determining the market value of stumpage of this timber at the time and place of either of these fires, you should take into consideration the location of the timber, its accessibility to transportation facilities, the character of the timber as to quality and quantity on the lands affected, the facilities or difficulty of logging the same and delivering the timber to market, the availability of such timber for use; the extent and accessibility of the markets, the convenience or inconvenience to the logging streams, or other means of transportation, its remoteness or nearness to mills or other customers that might have use therefor, and all the facts surrounding the incident, and determine as best you can from the evidence whether or not such timber had a market value per thousand feet, and if so, what it was, under all the circumstances, and, determining the market value, apply the rule that it is what property offered for sale by one who desires to sell but it not obligated to sell, would bring, being bought by some one who is under no necessity of buying it, and who is willing to pay the price, for any useful purpose.”

(Transcript of record, pp. 397-398.)

XXXIX.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

“Any changes or precaution adopted by the de-

fendant since these fires, if any, cannot be considered by you. A party has the right to adopt changes or take precautions after a fire that may be deemed more effective, and these changes or precautions cannot be considered as any admission or evidence that they were necessary or should have been adopted or in use before or at the time of the fires.”

(Transcript of record, p. 398.)

XL.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

“The plaintiff alleges in its complaint, and has introduced some evidence to the effect that the defendant’s right of way was not kept clean and free of combustible material liable, by sparks or coals discharged by its engines, to communicate the fire to the property of others. On that subject I instruct you that the burden of proof rests upon the plaintiff to show that the fire started on the right of way, for unless that fact be established, the alleged negligence of the railroad company in suffering the combustible material to get on its right of way was not the efficient and proximate cause of the accident, and upon that allegation of negligence the plaintiff would fail.”

(Transcript of record, p. 398.)

XLII.

Said Circuit Court erred upon the trial of said cause in instructing the jury as follows:

“Now in this, as in all cases, it is the duty of a

party to reduce his damages as much as can reasonably be done under the circumstances, and therefore, if you believe from the testimony that after this timber had been burned, it could have been disposed of by the Government officials for any sum—according to what sum it could have been disposed of, if it had an opportunity to sell it—it was, I think, its duty to have done so and thus reduced the damages, but in determining that question, and in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of this timber; whether they had an opportunity to sell it; whether they could have disposed of it, and all the circumstances that surrounded the location and condition of this particular timber now in controversy. If these people could have sold this timber—if there was a market for it and they could have sold it and gotten something for it,—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire.”

To which instruction the defendant then and there duly excepted.

Said Circuit Court erred particularly in instructing the jury as follows:

“And in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of this timber.”

To which the defendant then and there duly and particularly excepted.

Said Circuit Court erred particularly in giving that portion of said instruction, as follows:

"If there was a market for it and they could have sold it and gotten something for it—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, there was no market for it, and no opportunity to sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire."

(Transcript of record, pp. 399-400.)

The foregoing assignment of errors may be summarized as follows: *First*: The court erred in admitting in evidence over objection of the Railroad Company, the letter written by D. D. Bronson, Forest Inspector, to John A. Shaw, Secretary of the Railroad Company, and the letter of Shaw in reply thereto. (Assignment of Errors XVI, Transcript of Record, pp. 380-381.) *Second*: The court erred in admitting, over the objection of the Railroad Company, evidence of repairs made and precautions taken by the Railroad Company after the alleged injury was sustained; and erred in refusing to instruct the jury at the request of the company that they could not consider such evidence. (Assignment of Errors XIX, XX, XXI, XXII, XXIV, XXV, and XXXIX, Transcript of Record, pp. 384-389 and 398.) *Third*: The court erred in refusing to instruct the jury at the request of the company that it is only when the emission of sparks unusual in quantity or of an extraordinary size is shown, that a jury would be justified in inferring negli-

gence; and that even in that case the burden of proof is not shifted to the company. (Assignment of Errors XXV, Transcript of Record, p. 395.)

Fourth: The court erred in refusing to instruct the jury as requested by the company to the effect that it was the duty of the United States to minimize the damages, if any, sustained by it by reason of the alleged negligence of the Company; and erred in charging the jury as it did on this subject. (Assignment of Errors XXXVI, XXXVII and XLII, Transcript of Record, pp. 395, 397 and 399.) *Fifth:* The court erred in refusing to instruct the jury as requested by the company on the subject of the measure of damages. (Assignment of Errors XXXVII, XXXVIII Transcript of Record, pp. 396-397.) *Sixth:* The court erred in refusing to instruct the jury as requested by the company that the proofs must conform to the negligence alleged. (Assignment of Errors XL, Transcript of Record, page 398.)

Upon these assignments of error the company submits the following Points and Authorities:

POINTS AND AUTHORITIES.

I.

That a statement made by a party or his agent in a letter written by said party or agent, after he had reason to believe a controversy is impending, where the correctness of such statement is in issue, is self-serving and inadmissible.

Woolsey et al. v. Haynes, 165 Fed. 391;
Hightower v. Ansley, 126 Ga. 12;
Telford v. Howell, 220 Ill. 52;
T. D. Kellogg L. & Mfg. Co. v. Webster Mfg. Co., 140 Wis. 346.

II.

That evidence of repairs made or precautions taken after an injury is received, is not competent to prove antecedent negligence causing such injury.

Sappenfield v. Main St. R. R. Co., 91 Cal. 61;
Columbia R. R. Co. v. Hawthorne, 144 U. S. 207;
Davidson S. S. Co. v. United States, 142 Fed. 319;
Lake v. Shenango Furnace Co., 160 Fed. 893.

III.

That it is only when the emission of sparks unusual in quantity or of an extraordinary size is shown, such as would not be emitted from a well constructed locomotive, that a jury would be justified in inferring negligence in that particular. Even in that case, the burden of proof is not shifted to the Railroad Company, but such fact would cast upon the Company the duty of explanation only.

Elliott on Railroads, Sec. 1242;
Peck v. N. Y. C. & H. R. R. Co., 165 N. Y. 350, 351;

Chenoweth v. Southern Pacific Co., 53 Or.
114, 115;

St. Louis Southwestern R. Co. v. Moss, 84
S. W. 281;

Cincinnati Ry. Co. v. South Fork Co., 139
Fed. 537;

Toledo etc. R. Co. v. Star Flouring Mills,
146 Fed. 956, 960.

IV.

That it is the duty of a party whose property is injured, to minimize the damages if any which he has sustained by reason of the negligence of another.

V.

That where trees are destroyed by the negligence of another, the owner may bring an action either for the value of the trees so destroyed, or for the injury to the land. If the owner bring the former action, the proper measure of damages is the market value of the trees destroyed, independent of the land. If he bring the latter action, the measure of damages is the diminished market value of the land resulting from such destruction of the trees thereon. Where trees are injured by fire by the negligence of another, but not destroyed, the owner may bring an action for the injury to the trees or for the injury to the land, in either case the measure of damages is the difference between the market value

of such trees or land immediately before and immediately after the fire.

Central Railroad Co. v. Murray, 93 Ga. 256;
Gordon v. Railroad Co., 103 Mich. 379;
Atkinson v. A. & P. R. R. Co., 63 Mo. 367;
Union Pac. R. R. Co. v. Murphy, 76 Neb.
 547;
Hart v. Chicago & N. W. R. Co., 83 Neb.
 654;
Bailey v. Chicago, M. & St. P. Ry. Co., 3
 S. D. 531;
Miller v. Neale, 137 Wis. 426.

VI.

That where several acts of negligence are alleged proof of one will support a recovery; but the proofs must conform to the negligence alleged.

ARGUMENT.

I.

A STATEMENT MADE BY A PARTY OR HIS AGENT IN A LETTER WRITTEN BY SUCH PARTY OR AGENT, AFTER HE HAS REASON TO BELIEVE A CONTROVERSY IS IMPENDING, WHERE THE CORRECTNESS OF SUCH STATEMENT IS IN ISSUE, IS SELF-SERVING AND INADMISSIBLE.

This point covers the question raised by the admission in evidence, over the objection of the rail-

road company, of the letters set forth in Assignment of Errors XVI, Transcript of Record, pp. 380-382.

In the letter from D. D. Bronson, Forest Inspector, to John A. Shaw, Secretary of the Company, dated April 26, 1906, the writer says:

“Your right of way through the Cascade Forest Reserve in T. 10 S., R. 5 E. is *reported* by Ranger Harry G. Hayes as being in a very dangerous condition as regards brush, debris, rotting logs and ties, and is a menace to valuable timber owned by the Government on account of the liability of a spark from an engine starting a fire in this inflammable material which might result in great damage to other property by the spreading of forest fires thus started, in the dry season,” * * *

“If this right of way is not cleaned up by you in a thorough manner, and if a fire is started on account of neglect in not burning this debris, etc. resulting in damage to Government timber, the Government will at once take measures to recover full damages, on the grounds that the damage was caused by negligence on your part in allowing your right of way to be covered with inflammable material, which was a menace to the property of others.”

One of the allegations in the amended complaint is,

“That the said defendant company operated its said line of railroad in a negligent and careless manner in that said defendant company, on and prior to the 11th day of August, 1906,

carelessly and negligently failed and neglected to remove from its right of way where the same traverses and passes through the timber land in the State of Oregon belonging to and adjacent to lands belonging to the plaintiff, commonly known as the Cascade Forest Reserve, as aforesaid, debris and inflammable material consisting of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter, and carelessly and negligently failed and neglected to keep its said right of way in said places clear of such trees, logs, grass and old ties and dead and dry vegetable matter, and carelessly and negligently permitted and allowed large quantities of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter to accumulate along the right of way of said defendant's railroad where the same traversed and passed through said tracts of timber land aforesaid, well knowing that by reason of its said carelessness and negligence, great danger existed that a fire or fires might be started from sparks or cinders from any of its engines being run over said road, or from burning matches or cigar stubs that might be thrown from any of the trains running over said road in passing through said tracts of land, although the said defendant was notified and requested, on or about April 24, 1906, to remove said debris and inflammable material from said right of way and to prevent the accumulation of the same thereon by plaintiff's forest inspector located in Portland, Oregon."

(Transcript of record, p. 6.)

This allegation in the amended complaint is contained in each cause of action and is in almost the exact language contained in this letter.

These allegations in the amended complaint were denied by the company in its answer; and the question as to whether or not the company permitted brush, debris, rotting logs and ties and inflammable material to accumulate upon and along the right of way of the railroad company at the place stated, was one of the issues that was tried in this case.

That Bronson, the Forest Inspector, who wrote this letter, had reason to believe that a controversy was impending in which the correctness of his statement contained in this letter would be in issue, is manifest from the fact that in this letter the writer says that,

“If this right of way is not cleaned up by you in a thorough manner, and if a fire is started on account of neglect in not burning this debris, etc., resulting in damage to Government timber, the Government will at once take measures to recover full damages, on the grounds that the damage was caused by negligence on your part in allowing your right of way to be covered with inflammable material, which was a menace to the property of others.”

(Transcript of record, pp. 381-382.)

The language in this letter, to the effect that the right of way of the railroad company was covered with brush, debris, rotting logs and ties, and was a menace to valuable timber owned by the Government on account of the liability of a spark from an

engine setting a fire in this inflammable material, is a self-serving declaration and was inadmissible. The error of the court in admitting this letter was emphasized by the fact that this witness testified to the same matters contained in this letter.

This witness testified on this subject as follows:

“He gave a notice, April, 1906, to the defendant as to the condition of this right of way, through the Forest Reserve. It was a letter addressed to John A. Shaw—one of the officers—Secretary of defendant—and he kept a regular office copy.”

(Transcript of record, p. 155.)

This letter is also incompetent because it is hearsay. The writer says,

“Your right of way through the Cascade Forest Reserve in T. 10 S., R. 5 E. is *reported* by Ranger Harry G. Hayes as being in a very dangerous condition as regards brush, debris, rotting logs and ties, and is a menace to valuable timber owned by the Government, etc.”

(Transcript of record, p. 380.)

Harry G. Hayes was a witness for the Government and testified that,

“On July 23rd, and prior to that, the right of way near the track, was that all of the natural conditions afforded a great deal of brush, briars, fern, logs, timber, fir and such things, and the logging conditions afforded logs, rollways you might call them; the railroad company afforded rotten ties; in fact there was

almost all kinds of vegetation; there were places this vegetation and this matter were very dry, shortly prior to the first and second fires."

(Transcript of record, pp. 128-129.)

The admission of this letter in evidence had the same effect before the jury as if they had heard the oral testimony of the witness and then read the same after being transcribed. The rule is well settled that the deposition of a witness cannot be used where he has testified, unless it is used to contradict his testimony. It may have been competent for the railroad company to offer this letter against the United States but when offered in behalf of the United States it was a self-serving declaration and was wholly incompetent.

II.

EVIDENCE OF REPAIRS MADE OR PRECAUTIONS TAKEN AFTER AN INJURY IS RECEIVED, IS NOT COMPETENT TO PROVE ANTECEDENT NEGLIGENCE CAUSING SUCH INJURY.

The case of *Columbia & Puget Sound Railroad Company v. Hawthorne*, 144 U. S. 202, was an action brought against a corporation to recover damages for negligence in providing an unsafe and defective machine, whereby the plaintiff in said action was injured, and in that case the court said, (pages 206-7):

"This writ of error, therefore, directly pre-

sents for the decision of this court the question whether, in an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is competent evidence of negligence in its original construction.

“Upon this question there has been some difference of opinion in the courts of the several states. But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.”

This point covers Assignment of Errors XIX, XX, XXI, XXII, XXIV, XXV and XXXIX.

The court permitted witnesses for the Government, over the objection of the railroad company, to testify as to the condition of the company's engine after the fire of July 23, 1906, and also as to repairs made on said engine, as is shown in Assignment of Errors XIX, XX, XXI, XXII, XXIV and XXV. The court also refused to instruct the jury that any changes or precautions adopted by the railroad company since the fire could not be considered by them, and that a party had the right to adopt changes or take precautions after a fire that may

be deemed more effective, and that these changes or precautions could not be considered by the jury as any admission or evidence that they were necessary or should have been adopted or in use before or at the time of the fires. See Assignment of Errors XXXIX, Transcript of Record, p. 398.

The admission of this evidence by the court and the refusal to give this instruction was manifest error.

III.

IT IS ONLY WHEN THE EMISSION OF SPARKS UNUSUAL IN QUANTITY OR OF AN EXTRAORDINARY SIZE IS SHOWN THAT A JURY WOULD BE JUSTIFIED IN INFERRING NEGLIGENCE. EVEN IN THAT CASE THE BURDEN OF PROOF IS NOT SHIFTED TO THE RAILROAD COMPANY, BUT SUCH FACT WOULD CAST UPON THE COMPANY THE DUTY OF EXPLANATION ONLY.

This point covers the question raised in Assignment of Errors XXXV, Transcript of Record, p. 395, wherein the court refused to instruct the jury as requested by the railroad company, as follows:

“The fact, if you so find, that these engines at either of these times or at other times, may have allowed sparks to escape, and that such sparks may have been alive or sufficient to burn the skin of a person who might be riding on the train immediately behind such engine, would not of itself be any evidence that the defendant was negligent, or that these spark-arresters or

other appliances were defective or out of repair, or that the engine with these appliances was negligently operated. The defendant did not insure that sparks might not escape from its engine in a good state of repair with reasonably safe appliances and operated by reasonably careful and prudent persons in a reasonably careful and prudent manner, and it is only when such sparks are scattered in unusual quantities or of unusual size, that any inference of negligence in that particular can arise or be found by the jury."

The case of *Chenoweth v. Southern Pacific Company*, 53 Oregon, 111, was an action for the loss of hay by fire alleged to have been caused by the emission of sparks from engines of defendant, resulting from improper construction and careless and negligent management and operation of said engine. In that case the court in passing upon that question said, (page 119) :

"Evidence that the engine, just prior or subsequent to the fire, scattered sparks is not sufficient to import negligence. It is only when emitting them in unusual quantities or of unusual size that it has that effect."

We submit, therefore, that the court erred in refusing to give this instruction.

IV.

IT IS THE DUTY OF A PARTY WHOSE PROPERTY IS INJURED TO MINIMIZE THE DAMAGES, IF ANY, WHICH HE HAS SUSTAINED BY REASON OF THE NEGLIGENCE OF ANOTHER.

This principle of law is too well settled to require the citation of any authorities.

The foregoing proposition of law applies to the question involved in Assignment of Errors XXXVI, XXXVII and XLII.

The railroad company requested the trial court to give the instructions set forth in Assignment of Errors XXXVI and XXXVII upon the question of the duty of the United States to reduce the damages, if any, it had suffered by reason of the alleged negligence. Instead of giving these instructions as requested by the railroad company, the court gave the instruction set forth in Assignment of Errors XLII.

Our contention is that the instruction as given by the court was too narrow in its application and was too favorable to the Government,—especially the latter portion of this instruction, which is as follows:

“If these people could have sold this timber—if there was a market for it and they could have sold it and gotten something for it—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, they were not negligent in failing to do so, and the Government would be entitled to recover

whatever damages it sustained by reason of the fire."

Now this instruction as given by the court omits an important element. That is, it was the duty of the Government, through its properly constituted officers, to exercise reasonable diligence to sell the burned timber and realize therefrom as much as possible to reduce the damage which may have been caused by the fire. The instruction as given by the court would be applicable to a state of facts where the Government exercised no diligence whatever in the matter. This instruction, therefore, was erroneous and those requested by the Railroad Company should have been given. Besides, it was misleading in submitting to the jury, the question whether there was a market. There was no dispute upon that subject, and could be none. The United States, in order to show any damage, had shown a market value.

V.

WHERE TREES ARE DESTROYED BY THE NEGLIGENCE OF ANOTHER, THE OWNER MAY BRING AN ACTION EITHER FOR THE VALUE OF THE TREES SO DESTROYED OR FOR THE INJURY TO THE LAND. IF THE OWNER BRINGS THE FORMER ACTION, THE PROPER MEASURE OF DAMAGES IS THE MARKET VALUE OF THE TREES DESTROYED INDEPENDENT OF THE LAND. IF

HE BRINGS THE LATTER ACTION, THE MEASURE OF DAMAGES IS THE DIMINISHED MARKET VALUE OF THE LAND, RESULTING FROM SUCH DESTRUCTION OF THE TREES THEREON. WHERE TREES ARE INJURED BY A FIRE BY THE NEGLIGENCE OF ANOTHER, BUT NOT DESTROYED, THE OWNER MAY BRING AN ACTION FOR THE INJURY TO THE TREES OR FOR THE INJURY TO THE LAND. IN EITHER CASE THE MEASURE OF DAMAGES IS THE DIFFERENCE BETWEEN THE MARKET VALUE OF SUCH TREES OR LAND IMMEDIATELY BEFORE AND IMMEDIATELY AFTER THE FIRE.

This is an action for the value of trees "*burned and destroyed*" by the alleged negligence of the company. The measure of damages, therefore, under the issues as made by the pleadings, would be the market value of the trees destroyed independent of the land. The court, therefore, should have given the instructions requested by the defendant as set forth in Assignment of Errors XXXVII, XXXVIII, Transcript of Record, pp. 396 and 397. Instead of giving these instructions, the court instructed the jury on this subject as follows:

"In arriving at the damage, if any, sustained by the plaintiff, it will be your duty to take into consideration the market value of

the timber, both burned *and unburned*, immediately before and immediately after the fire, and the difference between such market values, if any, will be the damage sustained by the plaintiff *to this land and the timber thereon.*"

(Transcript of Record, pp. 344-345.)

As heretofore stated, this is an action for damages for the value of timber alleged to have been "*burned and destroyed*" by the negligence of the railroad company. It is not an action for damages for an injury to the land of the Government. Therefore, this instruction that it was the duty of the jury "to take into consideration the market value of the timber, both *burned and unburned*, upon the land immediately before and immediately after the fire, and the difference between such market values, if any, will be the damage sustained by the plaintiff *to this land and the timber thereon,*" was erroneous. This instruction allowed the jury too much latitude. It allowed them to consider not only the injury to the timber but also the injury to the land. The Government does not claim anything in its complaint on account of injury to the land upon which this timber was burned but only claims the value of the timber "*burned and destroyed.*"

VI.

WHERE SEVERAL ACTS OF NEGLIGENCE ARE ALLEGED, PROOF OF ONE WILL SUPPORT A RECOVERY: BUT THE PROOFS MUST CONFORM TO THE NEGLIGENCE ALLEGED.

This is a rule of pleading and evidence that is elementary. This proposition of law is applicable to Assignment of Errors XL, Transcript of Record, p. 398, wherein the railroad company requested the court to instruct the jury that,

“The burden of proof rests upon the plaintiff to show that the fire started on the right of way, for unless that fact be established, the alleged negligence of the railroad company in suffering the combustible material to get on its right of way was not the efficient and proximate cause of the accident, and upon that allegation of negligence the plaintiff would fail.”

The railroad company was clearly entitled to this instruction. One of the grounds of negligence, alleged in the amended complaint was “that the railroad company negligently permitted combustible material to accumulate on its right of way and that sparks from the engines of the railroad company started a fire in *this* combustible material and it spread *from said right of way* to and upon the tracts of timber land owned by the United States and burned and destroyed the timber belonging to the Government.” Manifestly, if the fire started *off the right of way* of the railroad company, then

the company would not be responsible, even though it was negligent in allowing combustible material to accumulate *on its right of way*, and this allegation of negligence would fail. The refusal of the court to give this instruction, or any instruction on this subject, allowed the jury to find a verdict for the plaintiff, even though the fire started in combustible material *off the right of way* of the railroad company.

We submit that by reason of the foregoing errors, the judgment of the lower court should be reversed and a new trial granted in this case.

Respectfully submitted,

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1926

**In the United States Circuit
Court of Appeals
For the Ninth Circuit**

**THE CORVALLIS AND EASTERN RAILROAD
COMPANY (a Corporation)**

PLAINTIFF IN ERROR

VS.

THE UNITED STATES OF AMERICA

DEFENDANT IN ERROR

Brief of Defendant in Error

Upon Writ of Error to the United States Circuit
Court for the District of Oregon.

JOHN McCOURT,

United States Attorney, and

WALTER H. EVANS,

Assistant United States Attorney,

Attorneys for Defendant in Error.

United States Circuit Court of Appeals

For the Ninth Circuit

THE CORVALLIS AND EASTERN RAILROAD
COMPANY (a Corporation)

PLAINTIFF IN ERROR

VS.

THE UNITED STATES OF AMERICA

DEFENDANT IN ERROR

Brief of Plaintiff in Error

STATEMENT OF THE CASE

Plaintiff in error will hereafter be designated as the railroad company and defendant in error as the United States, in accordance with the brief of plaintiff in error. The substance of the pleadings in the case are correctly set forth in plaintiff's brief and appear at pages 5 to 26 of the Transcript of Record herein.

Without going into details, it may safely be stated that the allegations of negligence in the complaint of the United States, were clearly proven. The railroad company's railway track and right of way extends through the Cascade Forest Reserve. Its right of way was acquired through unsurveyed public lands under the provisions of the act of March 3, 1875, and in accordance therewith is two hundred feet wide. The lands of the United States adjacent to the right of way, as well as the right of way itself, is covered with timber. The evidence showed that the right of way of the railroad company, at the points where the fires started, and in fact for a long distance in either direction therefrom, had never been cleared of brush, logs, rotten timber and other inflammable material which had accumulated upon the same since the construction of the road; that the only attempt made by the railroad company at any time to clear the right of way was the cutting of grass and ferns between the rails and for two or three feet outside thereof. The grass and ferns so cut were allowed to accumulate and lie upon the right of way just outside the rails, from year to year; that this accumulation of debris and inflammable material had become very dry and subject to ignition at the time of the fires in question, the season having been an especially dry one.

The evidence further showed that the fires in question were discovered a short time after an engine of the railroad company had passed; that when the engine mentioned reached the roundhouse, the engineer, on each occasion, reported that it had been throwing fire, and upon an examination thereof, shortly afterwards, a large hole was discovered between the netting and the rim of the stack to which said netting should have been fastened, through which large sparks, coals and cinders might have escaped; that this condition of the spark-arresting device could not have existed without negligence upon the part of the railroad company; that the railroad company did not maintain a system of inspections of the fire-arresting devices of its engines and did not examine the same until a report came in that an engine was throwing fire; that the engines passing over the road where the fires originated, were seen to emit large quantities of sparks and cinders of an unusual size shortly before and shortly after the fires complained of.

On July 23, 1906, shortly after train of railroad company had passed, fire was discovered on its right of way, which apparently had started in a rotten tie between the rails of its railroad track, or in inflammable material just outside of the track upon its right of way, and had spread therefrom to the timber belonging to the United States; that the wind was

blowing at the time, from the railroad track in the direction of which the fire travelled.

Again, on August 11, 1906, shortly after train of railroad company had passed, another fire was discovered which apparently had started in inflammable material a short distance from the railroad track and had spread therefrom to the timber of the United States. Evidence showed that this fire had either started in the dry grass or through inflammable material on the right of way, or in a pile of lumber near the track, or in an old cabin which existed near the railroad track, upon the right of way. The wind at the time was blowing in the direction in which the fire travelled. Evidence showed that there was no probable source in which these fires might have started other than the locomotive of the railroad company drawing the train which passed shortly before the fires were discovered. Both of the fires mentioned burned for several days and destroyed a large quantity of timber belonging to the United States.

The evidence clearly showed that the quantity of timber, claimed to have been destroyed in the complaint, was burned by the fires in question, and while all of said timber was killed by the fires and a portion thereof totally destroyed, part of said tim-

ber could have been put to a beneficial use and used if disposed of within one to five years after the fire, and that the timber which was thus killed but not destroyed was impaired in value from fifteen to forty per cent of its value immediately after the fire. In two years that said wood would be entirely destroyed and in about five years the timber would be a total loss.

It was further shown that the Forest Service of the United States attempted, after the fire, to dispose of this burned timber, but without success, except as to a small quantity thereof. The trial jury returned a verdict in favor of the United States against the railroad company for the sum of \$4422.28, upon which verdict judgment was entered.

This action was brought to recover the sum of \$10,754.44. Of this latter sum about \$10,000.00 was claimed as damage to the timber injured and destroyed, and the remainder for expenses in preventing the further spread of the fires.

The jury, therefore, after returning to the Government the sum it expended in preventing the spread of fire and further destruction of timber, with interest thereon, gave to the Government approximately thirty-five per cent of the amount it

claimed the timber was worth immediately before the fire. While the testimony showed that the timber was worth somewhat more than the Government alleged its value to be, yet the court instructed the jury that a greater value than the Government placed on the timber should not be placed thereon by the jury.

ARGUMENT

I.

In the first subdivision of its argument, the railroad company complains of the introduction in evidence of certain letters written by the Forest Inspector of the United States to the railroad company, and the reply of the railroad company thereto. This complaint is the basis of the railroad company's assignment of error No. XVI (Transcript of Record, pages 380-382).

It is charged that the letters mentioned are self-serving declarations and are inadmissible because written while a controversy was impending. The authorities cited by the railroad company have reference to cases arising upon contract, and after a dispute had arisen as to the terms or meaning of the contract, and have no application to this case. The

letters complained of were offered in evidence for the purpose of showing that the railroad company had actual notice of the condition of its right of way and a clear apprehension of the danger to be anticipated by reason of the presence upon said right of way of large quantities of inflammable material.

While the printed record in this case does not show the purpose for which this testimony was offered or that any statement of its purpose was made, it was clearly competent, in a case of negligence to show that the company had knowledge of the conditions complained of prior to the occurrence of the fires in question and thus must have clearly apprehended the danger existing. Moreover, when the evidence was offered, it was clearly stated that the purpose of the same was to show knowledge upon the part of the railroad company of the condition of its right of way, bringing to their mind an apprehension of the danger existing. The letters were restricted to the purpose for which they were offered, as shown by the following transcript of the notes of the stenographer who took the testimony:

“MR. McCOURT: These letters are offered, if the Court please, for the purpose of showing knowledge upon the part of the railroad company of the condition of its right of way, and further, a notice

which brought to their mind an apprehension of the danger that already existed, and the damage which would occur, if they did not have it already — all within their duty as a railroad company.”

“MR. FENTON: The objection to this is that the notice is immaterial, and that, insofar as it was the duty of the defendant railway company to protect its own property and to exercise ordinary care to not injure another—to protect from fire, debris, and things of that kind—it was its duty to do that as a matter of law; it required no notice. And further that the documents there contain self-serving declarations in favor of the United States, and would therefore be prejudicial—might be prejudicial, and might not be evidence that should be considered by the jury. No notice was necessary or material to charge a party in a matter of this kind.”

“COURT: I suppose no notice was necessary to charge this company with negligence—with the result of their negligence in leaving this debris and inflammable material along that way.”

“MR. McCOURT: I so understand the law.”

“COURT: But I don’t see that this letter, which is simply a notice to the company, calling its atten-

tion to that fact, would be of any special injury, and it does show notice to the company of the fact that it was claimed that their line was in this dangerous condition. I think the government is entitled to the testimony. I shall admit it."

While knowledge of the dangerous condition of its right of way, and apprehension of the danger therefrom is imputed to a railroad company, affirmative evidence in addition to the legal presumption is admissible.

Encyclopedia of Evidence, Vol. 9, page 890.

A common and frequent application of this rule is found in the introduction of evidence to sustain the presumption of good character and to show that a condition, or status, continues, which when once shown is presumed to continue as a matter of law. In this case, before the letters in question were introduced in evidence to show knowledge on the part of the railroad company of the condition of its right of way and the danger therefrom brought to its attention several months before the fires in question, a dozen or more witnesses had been called, all of whom had testified to the large accumulation of inflammable material on the right of way of the railroad company.

The purpose of the Forest Inspector in sending the letters to the railroad company was to notify it of the dangerous condition of its right of way and the necessity for taking precautions against the danger. The purpose of introducing the letters in evidence was to show that the railroad company had received the notice. No attempt was made to use as evidence the declaration, contained in the letters relating to the condition of the right of way. It was not necessary—a dozen witnesses had already testified to these same facts. The railroad company was in no way prejudiced by the admission in evidence of the letters in question and besides there was no error in admitting the same.

II.

The railroad company complains that the court permitted testimony to be introduced of repairs to the engine that it was claimed started the fire of July 23, 1906, and this complaint is set forth in its Assignment of Errors Nos. XIX, XX, XXI, XXII, XXIV and XXVI.

The evidence complained of in the Assignment of Error No. XIX, is found on pages 166 to 169, Transcript of Record.

And inspection of the record discloses that no objection was made by plaintiff in error to the tes-

timony included in said Assignment of Error No. XIX, except a motion was interposed to strike out that part of the testimony wherein the witness attempted to detail a conversation between himself and the engineer who ran the engine. Whereupon the court instructed the jury and the witness as follows:

“The conversation he had would not be competent in this case, but what he saw on examination of the engine would be competent.”

“TO THE WITNESS: Counsel asks you what you did, what you know by your own examination, not what somebody told you.”

The testimony of which complaint is made, in Assignment of Errors Nos. XX and XXI, is found on pages 169 to 170, Transcript of Record.

The objection of the plaintiff in error to the testimony set forth in Assignment of Errors Nos. XX and XXI, was made upon the ground that there was nothing in the pleadings charging negligence regarding the ash pans in the engine, and did not touch the question of repairs.

As to Assignment of Errors Nos. XXII, XXIV and XXV, there is nothing therein relating to the matter of repairs of which counsel complains. The purpose of the testimony contained therein was to sustain the allegation of plaintiff's complaint that the railroad company negligently permitted the spark and fire-arresting apparatus on its engines to be out of repair. It was later shown by the testimony of the witnesses of plaintiff in error that properly conducted railroads found it absolutely necessary to make regular inspection of their fire-arresting devices in order to properly guard against communication of fire by engines.

(Testimony of T. W. Younger, Transcript of Record, page 269.)

All of the testimony complained of, and given by the witness Jacob Merle, was given in response to the inquiry of defendant in error as to the condition of the spark-arresting devices, of the engine claimed to have set the fire of July 23, 1906, immediately after the fire. No question was asked as to the character of repairs made, or as to whether any repairs whatever were made upon the engine. If any testimony was given by the witness that the defects shown were repaired, it was merely incidental and voluntary. In fact there was no evidence

of that character given, sufficient to attract the attention of the court or jury, to the fact that the same was given. At page 168, Transcript of Record, the witness Merle after testifying to an extended examination of the spark-arresting device of the engine, after the fire of July 23, testified as follows:

“And he got up on this engine and looked at the stack, and found between the casting of the trap door, where the man that had put the netting in did not have material enough to reach over to the flange, consequently he could take his rule by opening it two inches single thickness—two-foot rule—and put it between the casting and the netting; he went to work and got some pieces of netting.”

The witness then continued without any question by defendant in error, or anybody else, as follows:

“He (I) went to work and got some pieces of netting—the engine had to be used—and put in three different pieces, I think; they have six courses in that or more—the same stack went on the second engine; on that engine at that time I put them in and flanged them out, and that stack was all right after that.”

No motion was made to strike out this testimony, and no objection was made to its introduction. Nor was the testimony called for by any question asked by defendant in error. At the time the testimony was given it was entirely competent in favor of plaintiff in error, because if the engine had been repaired immediately after the fire of July 23, the defect shown would not have been the cause of the fire of August 11.

The witness later, however (Transcript of Record, page 169), said that "It was after the second fire that he located that stack." This latter statement was brought out by direct inquiry by the defendant in error, not for the purpose of showing subsequent repairs, but to ascertain whether or not the defective condition of the stack, shown to have existed at the time of the fire of July 23, still existed at the time of the fire of August 11.

The evidence complained of in Assignment of Errors Nos. XX and XXI, applied to the condition of the ash-pan of the engine immediately after the fire of July 23, and was elicited for the purpose of ascertaining whether or not the ash-pan was in such condition that coals and cinders would be readily dropped through from under the engine. (There was considerable evidence tending to show that one of

the fires originated between the rails of defendant's railroad track, and might have occurred from large coals dropped from the ash-pan of the engine.)

As above stated, the testimony regarding the ash-pan was objected to on the ground that the complaint did not include defects in the ash-pans of the engines. The witness was asked the following questions:

“Now, on these examinations, what condition did you find the ash-pan in? That is, the apparatus underneath to—”

The witness proceeded to testify as follows, without any further questions:

“Mr. Walsh had come and asked me to look over the ash-pans at that time, and we found the ash-pan netting—after looking at the stack and everything, he insisted on looking at all the ash-pans; they looked at engine one's ash-pan and the netting did not come to the mud-rim by two inches—the piece of netting; the ash-pan is maybe from eight to ten inches deep, and the netting came—it is bolted on with three bolts on the bottom of the ash-pan, two bolts on the side. There was a space of two inches. He looked through the wheel himself. He insisted on my putting a piece

of netting across. We did not bolt it on but sewed it on with wire, and it remained in that way that season.” (Transcript of Record, page 169.)

The examination continued as follows:

“Q. What was there between this mud-rim and the piece of netting?

“A. There was nothing when the damper was open. When it was shut the damper was closed.

“Q. How much of an aperture for the escape of sparks and coals?

“A. You could put your arm through it; the full length of the ash-pan—the full width of it, and in one corner of that the ashes had accumulated all around. The ashes were kind of hot, and it bucked it up. I corked in asbestos, and kind of fixed it down.”

The words underscored are the only ones that could be construed as constituting repairs. Said testimony was not objected to, nor was any motion made to strike it out for that reason. Moreover, the testimony was entirely competent to show the condition of the engine shortly, or immediately prior

to August 11, 1906. It is entirely clear that the testimony of the witness given, showed the defective condition of the fire-arresting apparatus of the engine prior to the fires. That is that the screen in the stack of the engine examined did not connect with the rim thereof, to which it should have been fastened, by an inch or more upon one side, and that there was an aperture between what is called the "mud-ring" and the top of the ash-pan, several inches in width, through which coals and cinders might escape or drop. These conditions were what was sought to be elicited by the questions asked of witness Merle. These were the facts brought out by those questions. In relating them Merle incidentally volunteered that when he discovered the defects he corrected them. Those voluntary statements on the part of Merle did not emphasize the presence of the defects in any respect.

If an effort had been made to show repairs, changes or precautions, made and taken after the fire for the purpose of having the jury infer therefrom that a defective condition existed prior thereto, then the evidence would have been objectionable, but where the defects were clearly shown it did not make them any greater or less because the witness volunteered that he corrected them. Therefore, the evidence complained of could not have in any way prej-

udiced plaintiff in error. Moreover, as has been pointed out, no objection was taken to the testimony nor was any motion made to strike it out, except upon the ground that the pleadings were not sufficiently broad to admit evidence relating to the ash-pan.

The railroad company, however, complain that notwithstanding the fact that they did not object to this testimony or make any motion to strike it out, still error was committed by the court in not instructing the jury to disregard the testimony. (Assignment of Error XXXIX.)

See *Southern Pacific v. Hall*, 100 Fed. 760, 768, where such refusal is held not to be error.

In the first place the evidence complained of was all directed to a time before the fire of August 11, 1906, and was calculated to show the condition of the engine immediately, or shortly before that fire.

In the next place, as has been pointed out, the testimony in no way prejudiced the railroad company, because it was not given to show negligence of the defendant. Negligence had already been amply and clearly shown by direct testimony. The faulty condition of the engine had been directly pointed out by direct and positive evidence. No inference of

defective condition from repairs was sought or required. For that reason there was no occasion for giving the instruction requested. Besides, the instruction requested did not apply to repairs, but to "changes or precautions adopted by defendant since those fires." There was no testimony of any changes or precautions adopted by defendant after the fires, nor was any attempt made to show that the railroad company had made any changes or taken any precautions to prevent a repetition of the injuries complained of. Therefore, there was no evidence in the record to justify the instruction asked, nor any contention made for the same.

III.

By its Assignment of Error No. XXXV, the railroad Company complains that the refusal of the court to give an instruction requested by it, and shown on page 32 of its brief. The burden of the complaint is that the court refused to instruct the jury that "It is only when the emission of sparks unusual in quantity or of extraordinary size is shown that a jury would be justified in inferring negligence."

The trouble with the assignment of error is that the court gave an instruction completely covering this matter. The court instructed the jury as follows:

“The mere fact that just prior or subsequent to, or about the time of the fire, or at any time testified to by witnesses, the engines scattered sparks, is not, of itself, sufficient to impute negligence to the defendant, because it is practically conceded that an engine properly equipped will, under some circumstances emit sparks of some character. It is only when it appears that sparks are emitted in unusual quantities or of unusual size, that there would be any presumption of negligence in the construction, repair or operation of the spark-arrester, or other appliances used by the defendant.”

(Transcript of Record, page 341.)

“All the law required of the defendant is the exercise of ordinary and reasonable care, such care as an ordinary reasonable person engaged in that business and under all the circumstances would have exercised, and if it does that it has exercised all the duties the law can impose upon it. It is not an insurer. It does not guarantee nor is it required to guarantee that no fire will issue from the engine or no sparks will issue from the engine, but it is required to exercise reasonable care to keep its right of way free from inflammable material so that fires that

naturally drop from the engines will not communicate to the adjacent property, and it is also required to exercise reasonable and ordinary care to provide its engines with the latest, approved appliances to prevent the escape of sparks and fire, and to keep such appliances in repair, and to provide skillful and competent servants to operate its engines and to see that they operate them in a skillful and proper manner, so that fire will not escape. When it has done all this, then it has discharged the duties the law imposes upon it, and it would not be liable, but if it fails to do so, then it is liable for the consequences of its negligence.”

(Transcript of Record, page 339.)

The court’s instructions fully cover the matter complained of and there was, therefore, no error.

IV.

The railroad company, in its Assignment of Error No. XXXVI, complains at the refusal of the court to give the following instructions:

“I instruct you that under the law and the evidence in this case, the United States, by its officers and agents, had authority to sell this burned timber, either with or with-

out any other timber that might be left standing. If you find from the evidence that if the United States, by its officers and agents in charge, by the exercise of reasonable diligence, could have sold the burned timber and realized therefrom so as to reduce the damage which may have been caused by the fire, then the plaintiff in this case would not be entitled to charge the defendant for any damages which could have been thereby avoided, even though you find that the defendant negligently caused the damages or some portion of the damages claimed on account of either of the fires respectively. By this I mean that if the timber which was burned over could by reasonable diligence have been sold for as much as the plaintiff claims such timber was worth at the time, and if such sales could have been made within a period of two or three years, and thereby the damages reduced or wholly avoided, then to the extent that the plaintiff could have reduced such damages by such sale, even though it was the full value of such timber, the plaintiff would not now be entitled to charge the defendant therewith."

(Transcript of Record, pages 395-396.)

"And if you find from the evidence that the United States by its forestry officers or other persons having charge of its business,

attempted to sell or offered for sale this burned timber at a price beyond its market value, as I have defined it, then the fact that there was no sale under such circumstances would be no evidence that the plaintiff had used reasonable diligence in attempting to make such sale or in attempting to avoid the loss caused by such fire or fires.”

(Transcript of Record, page 396.)

Complaint is also made in Assignment No. LXII, because the court gave the following instruction:

“Now in this, as in all cases, it is the duty of a party to reduce his damages as much as can reasonably be done under the circumstances, and therefore, if you believe from the testimony that after this timber had been burned, it could have been disposed of by the Government officials for any sum—according to what sum it could have been disposed of, if it had an opportunity to sell it—it was, I think, its duty to have done so and thus reduced the damages, but in determining that question, and in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of this timber; whether they had an opportunity to sell it; whether they could have disposed of it, and all the circumstances that surrounded the location

and condition of this particular timber now in controversy. If these people could have sold this timber—if there was a market for it and they could have sold it and gotten something for it—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire.”

Plaintiff in error complains that the instruction given by the court omitted the element of reasonable diligence which should have been imposed upon defendant in error in disposing of the damaged timber, and also that it submitted to the jury the question of whether or not there was a market for this injured timber.

T. H. Sherard, Supervisor in charge of the Oregon National Forest, testified that the timber burned had been for sale ever since the fire, and that a diligent and vigorous effort had been made to sell the same and that green timber was offered in connection with the burned timber in order to facilitate the disposal of the burned timber; that they offered the burned timber at any price, and went around among possible purchasers and endeavored to induce the latter to purchase said burned timber.

(Transcript of Record, pages 247-255 and 256.)

The court, however, further instructed the jury as follows:

“I do not understand that one can negligently and carelessly cause a fire in a timber claim belonging to another, and then respond in damages to the full extent that the other suffered by reason of that fact because the timber would, from a speculative standpoint, be worth more money. Whether it is worth anything or not, is of course dependent upon the market. After the timber is killed, the testimony in this case shows it will decay, and it will decay in a certain length of time. Now, if during that time, before it decayed, there was no market for the timber, no opportunity to sell it, no means by which a man could get any money out of it, the fact that it may have a speculative market value ought not, it seems to me, to be a reason why the damages should be reduced, provided the owner of the property **exercised reasonable care and diligence and effort to dispose of the property and reduce the damages to the smallest possible extent**, and in that view you have a right to consider this question as it appears from the testimony in this case.”

(Transcript of Record, pages 346-347.) . . .

It is submitted that when the entire instruction of the court is taken into consideration it covers all of the objections urged by plaintiff in error.

V.

Plaintiff in error by its Assignment of Errors Nos. XXXVII and XXXVIII (Transcript of Record, pages 396 and 397) complains of the refusal of the court to give the instructions requested by plaintiff in error and set forth in said assignment of errors. Under this head the main proposition laid down in the points and authorities and argument of railroad company is stated in the following language:

“Where trees are destroyed by the negligence of another, the owner may bring an action either for the value of the trees so destroyed or for the injury to the land. If the owner brings the former action, the proper measure of damages is the market value of the trees destroyed independent of the land. If he brings the latter action the measure of damages is the diminished market value of the land, resulting from such destruction of the trees thereon. Where trees are injured by a fire by the negligence of another, but not destroyed, the owner may bring an action for the injury to the trees or for the injury of the land. In either

case the measure of damages is the difference between the market value of such trees or land immediately before and immediately after the fire."

In its argument plaintiff in error complains that the court instructed the jury on the measure of damages as follows:

"In arriving at the damage, if any, sustained by the plaintiff, it will be your duty to take into consideration the market value of the timber, both burned and unburned, immediately after the fire, and the difference between such market values if any, will be the damage sustained by the plaintiff **to this land and the timber thereon.**"

(Transcript of Record, pages 344-345.)

No exception was taken by the plaintiff in error to the instructions given by the court on the measure of damages.

The railroad company complains in its argument that the instruction given allowed the jury too much latitude; that it allowed them to consider not only the injury to the timber but also the injury to the land.

While the complaint alleges generally that the plaintiff was damaged in the sums sought to be recovered by reason of the destruction of the timber in question, no effort was made to show that any damage had occurred to the land upon which the timber stood, but the evidence was directly entirely to the matter of the damage to the plaintiff by reason of the destruction of the timber. The Court carefully restricted the jury to the damages suffered by plaintiff by reason of the destruction of the timber. The jury was plainly told that in this case as it had been presented to them, the difference between the market value of the timber immediately before the fire and its market value immediately thereafter, constituted the damages sustained by the plaintiff, and their verdict thus reached would compensate the government for the injury to its land as well as the timber thereon. They were in effect instructed that if there was any injury to the land it had not been claimed or proved, and that the injury to the timber would cover the damages to both the timber and the land so far as this case was concerned. In other words, the jury might disregard entirely the question of injury to the land.

The Court instructed the jury upon the matter under consideration as follows:

“The measure of damages in this case is the difference, if any, between the value of this timber immediately before the fire and immediately after. I think it probably can be assumed from the way the case been tried, and from the record in this case, that the value of this property consisted in the timber, and that the land, without the timber, is of no special value, at least the evidence has all been directed to show the amount of timber destroyed, and its value. Of course the land belongs to the Government of the United States, and there is no law I believe, under which it could be disposed of, but there is a law authorizing the sale of timber from Government reserves under certain conditions and restrictions, and therefore, in arriving at the damages, if any, sustained by the plaintiff, it will be your duty to take into consideration the market value of the timber, both burned and unburned upon the land immediately before and immediately after the fire, and the difference between such market values, if any, will be the damage sustained by the plaintiff to this land, and the timber thereon. You are authorized in arriving at this conclusion to take into consideration the location of the land and the timber, its accessibility to market, and the transportation facilities, the quality of the timber, the effect of the

burned timber upon the value of the other timber adjacent to or surrounded by it, together with all the other evidence in the case. To the sum which you may find to be the damage, the plaintiff is entitled to recover the amount of the destruction of this timber, you will add the amount that it expended, or the amount the testimony shows that it expended in fighting these fires and in preventing them from spreading into other and adjoining timber, and to this latter item, you will be justified in adding interest at six per cent, or the legal rate.”

(Transcript of Record, page 345.)

Plaintiff in error at the trial complained that the Court in giving the foregoing instruction had used the expression “and the effect of burned timber upon the value of other timber adjacent to it.” Exception was taken to that expression upon the ground that it had not been pleaded. Whereupon, the Court further instructed the jury as follows:

“Gentlemen, these instructions were submitted by the counsel, and it may be that in reading them, I read more than I intended to. My attention has been called by Mr. Fenton to the fact that in instructing as to the measure of damages, I said you might

take into consideration the effect the burned timber would have upon the other timber standing adjacent. I did not intend to give that instruction. The question for you to determine is the injury to the timber that was destroyed.”

(Transcript of Record, page 348.)

The instruction given fully met the complaint made by the railroad company and enabled the jury to arrive at a verdict in accordance with the law and the facts of the case. Hence there was no error.

The court refused the request of the railroad company to give the following instruction:

“The plaintiff alleges in its complaint, and has introduced some evidence to the effect that the defendant’s right of way was not kept clean and free of combustible material liable, by such sparks or coals discharged by its engines, to communicate the fire to the property of others. On that subject I instruct you that the burden of proof rests upon the plaintiff to show that the fire started on the right of way, for unless that fact be established, the alleged negligence of the railroad company in suffering the combustible material to get on its

right of way was not the efficient and proximate cause of the accident, and upon that allegation of negligence the plaintiff would fail."

(Transcript of Record, page 398.)

Of this refusal, error is assigned. The matter was completely covered by the instruction of the court, as shown by the following quotation:

"And then again, if it should appear that the defendant company was negligent in permitting or allowing inflammable material to accumulate along its right of way, and that it was not negligent in the other respects pointed out in the complaint, and to which I have called your attention, it would of course be necessary before you could find it liable for the injury alleged in this case, that the fire **originated in this inflammable material and on this right of way.** In other words, if the company allowed inflammable and combustible material to accumulate on its right of way, and the fire started somewhere else, not in that material, and it was not the cause of the injury, then while it might be negligent, it was not the negligence causing injury to the plaintiff in this case, and the plaintiff would not be entitled to recover on that account."

(Transcript of Record, page 341.)

In fact the instruction of the court more clearly and emphatically placed the proposition contended for by the railroad company before the jury than requested by it.

The evidence in this case clearly and conclusively supports the verdict and judgment herein. Evidence was given in the case showing beyond question the presence of large quantities of inflammable material upon the right of way, and defects in the fire-arresting devices upon the engines of the railroad company. It was shown beyond doubt that the fires complained of were set by the railroad company and that the timber alleged to have been destroyed was burned by said fires. The only serious contention made by the railroad company was upon the amount of damages that should be awarded the United States.

Upon this question the defendant called witnesses who in part testified as follows:

Testimony of F. Benson

No trees are killed by fire; damage to trees that are from 36 inches to five or six feet is little or nothing for the first two years, then the sap turns black and the loss is about 10 to 25 per cent up to five

years; for the first two years after the fire there is no damage to speak of, and in the third year there is a commencement of discoloration of the sap of the tree; during the third year practically all the sap turns black so that it is not merchantable, and there would be added during the third and up to five years, in his judgment, and from his experience and observation and from his logging in this character of timber, ten to fifteen per cent. In timber such as that described in this case there would be no damage for the first two years after the fire. That the maximum damage to stumpage was from fifty cents to \$1.50 per thousand. In some places the coloring of the sap ensues quite soon after the fire, and others it takes some time; the valuation differs in different localities; the maximum or minimum of allowance to be made on burned timber he should say was 20 to 25 per cent, about the average; in purchasing they do not make that allowance in the first year or any other time, he bought timber where he didn't make any allowance because it stood where he could get at it to log it off, * * * If it had been way back he would not have bought it at all. Breakage is larger in dry timber than in green, but does not appear in a pronounced way until three years after the burn occurs. If it were logged in three years it would be worth good money; the relative deduction to be made would be 25 per cent.

(Transcript of record, pages 227, 229, 230, 231 and 232.)

Testimony of E. C. Clair

“Up to the end of the second year there is practically no depreciation; from the second to the fifth year he would say there was a loss of from 25 to 30 per cent. After that it is uncertain, it depends upon the kind of timber. There is no depreciation in value by reason of a fire of that kind up to the end of the second year; then the sap is lost, after that there is no further depreciation for a period of about three years. The second year there is some depreciation as far as the sap is concerned, the sap is lost, after that there is no change to speak of, for three years after that, then a small borer worm gets in and destroys the smaller timber. He figured, in his 30 to 40 per cent estimate, some loss on sap and some in breakage. In either case it was about five years after the trees were killed that the borer worms attacked their red fir, they attack it first near the butt, and thinks they work up, because he did not find them in the top until later; the sap is a total loss at the end of two years, and it is about six years before the worms get into the heart wood of the tree; their progress in the heart wood was more rapid, in their case, as they go through the sap they get strong, and go right in for

all they are worth. (Transcript of Record, pages 304, 305 and 306.)

Robert S. Shaw, manager of the Curtis Lumber Company, testified that he knew where the fires of July 23 and August 11 occurred and knows the section of the country over which the fire run, and is acquainted with the timber in that locality. Has had experience in handling timber that has been burned over in that section of the country. He had some timber belonging to the company of that character, situated in that burned district as shown on the map. They commenced logging directly after the burn, and for the first or about two years did not figure any loss to speak of, and after probably in the third year, the sap commences to color, and by the expiration of the third year, they figure on losing the sap; trees 36 inches in diameter to five feet in diameter would have sap about $11\frac{1}{2}$ inches in thickness; they have manufactured out of burned timber since they have been operating the Curtis Lumber Company, probably about 40,000,000 or 50,000,000 feet; there was scarcely any burned in there before the fire of 1906. They logged an eighty this last winter that was burned during the fire, the loss was probably 25 to 30 per cent. The market value of timber in that vicinity in 1906, ~~he does not think they paid~~

exceeding fifty cents, he would consider that the market value.

The purchase of the claims of Myer, Kressler and Carlton was made through another member of their company; believes he signed vouchers for them, but the price paid he does not know. Does not remember telling Mr. Hayes, then employed in the Forest Service, that he had purchased these claims and paid more than \$1 for it, or more than the Hoover people offered. It is true that he heard the three claims, Kressler, Carlton and Myer, or some of their representatives, offered their claims to Hoover and Company over the telephone for \$1.00 per thousand.

His father, John A. Shaw, was secretary of the Corvallis and Eastern Railroad.

(Testimony of Robert S. Shaw, Transcript of Record, pages 235 to 247.)

The Government offered testimony that the timber as a whole was good merchantable timber, after it had been killed by the fire, if it had been logged before the sap wood had decayed. Ordinarily the fire does not eat into green timber to any extent unless it is a very hot fire; if there were any trees that had been sound before the fire they had been utterly destroyed; they were very few.

(Testimony of A. E. Cahoon, Transcript of Record, page 193.)

Testimony of W. A. Hoover

Lived in that country in 1906, had been buying and dealing in timber by the quarter section, in the tree. Thinks he knows the price and market value of merchantable timber in that locality. It would run from sixty cents to \$1.50 a thousand by the quarter section. Within a year after the fire had gone through it, the sap would be gone, the worms would be in the sap; that is in a year or two, probably less time, and he would not care about buying it without he had a mill and could use it right away.

(Transcript of Record, page 194.)

H. G. Hayes testified, in 1906, timber in that locality was selling for \$1 or more per thousand.

(Transcript of Record, pages 198-201.)

James Taylor, for plaintiff, testified as follows: A fire has an effect of 25 to 100 per cent upon the value of timber right after the burn, and it takes about five years to make it a total loss; sap rot renders the reduction of value and volume as small as

25 per cent after the fire; sap rot produces it altogether; if one can log it right after it is burned, the loss is not less than 25 per cent. He knew what the value of timber was in that locality, standing timber, before and after this fire. His company figured as the market value from \$1.00 to \$1.50, according to location of the timber. That is what they allowed for stumpage and logging timber; in Sections 7, 8 and 17, in Township 10-5, merchantable timber such as is used in logging, was of the value of, I should say, about \$1.00.

(Transcript of Record, pages 206 to 211.)

Dr. E. A. Lewbaugh testified as follows: Have had occasion to check over estimates that were made just before the fire and just afterwards, and estimates the loss at, in volume, at between 20 and 30 per cent, which is as near as you can figure. This work was done within the first year. Have not had occasion to go over any in the second year.

He would think the general loss would run anywhere from 25 to 40 per cent, 40 per cent to include a fair amount of breakage. That would be the total loss from the loss of sap and so on, and would extend over a period of, say ten years, after the fire. I would consider the loss of value even greater; I would

consider it as high as 50 per cent, depending upon the percentage of burned area and the green area. In this particular locality I consider the danger even greater from a speculative standpoint on account of the proximity of the railroad; not only due to the fact that the railroad is there, but to the fact that it is a traveled highway — people passing up and down there all the time. If it was off in an isolated place, in a cul-de-sac, where people were not going by, it would be of better value than to be near a traveled highway. Another thing, they are operating in there constantly in that vicinity. The danger of recurrent fires over the logged over lands, of course, everybody can see that they are greater.

(Transcript of Record, pages 211 to 224.)

As hereinbefore pointed out, the Government was unable to sell the burned timber mentioned, notwithstanding a diligent effort was made to do so. The evidence disclosed that if there had been an available market for this timber immediately after the fire, the loss sustained by the Government would have varied anywhere from 15 to 50 per cent of the value of timber standing, green, and that if not sold within five years the loss would be anywhere from 50 per cent of the full value of green timber to a total loss thereof.

At the time of the trial, three years and a half after the fire occurred, no sale of the timber had yet been made and there existed very slight prospect for any sale of a substantial quantity of said timber within any reasonable time. The jury, however, from this wide range of value, awarded the Government approximately 35 per cent of the value of the timber as it stood at the time of the fire. The jury could not well have reached a verdict for a less amount under the evidence in the case, but might well have found a much larger sum in favor of the Government. The jury could not have adopted any reasonable theory of the case under which it could have arrived at a verdict against the United States. It is not anywhere claimed by the railroad company that a verdict should have been rendered in its favor; the only complaint is that some ~~certain~~ ^{of the} errors were committed in reaching a correct verdict. The record purports to, and does in substance, contain all the evidence in the case and clearly establishes the correctness of the verdict.

Under these circumstances, even though there be some slight error in some of the Court's rulings, the judgment being right, on the merits, will not be reversed.

Henderson Bridge Co. v. McGrath, 134 U. S.
260.

Grimes Drygoods Co. v. Malcom, 164 U. S. 485.

Mobile Railway Co. v. Jurey, 111 U. S. 584.

Barber Asphalt Paving Co. v. Odez, 85 Fed.
754.

The judgment in this case should be affirmed.

Respectfully submitted,

JOHN McCOURT,

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of Oregon.

STATE OF OREGON, }
 County of Multnomah. } ss.

Due and legal service of the foregoing brief is hereby accepted and the receipt of a true copy thereof is hereby acknowledged.

.....
 Attorneys for Plaintiff in Error.

STATE OF OREGON, }
 County of Multnomah. } ss.

I, John McCourt, hereby certify that I am United States Attorney for the District of Oregon and attorney for defendant in error in the within entitled action; that I prepared the foregoing copy of brief and have carefully compared the same with the original thereof and it is a true and correct transcript of the said original and the whole thereof.

.....

7

No. 1934

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE NORTHERN PACIFIC RAILWAY COMPANY
(a Corporation),

Plaintiff in Error,

vs.

JOHN MARINOVICH,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit
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FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

NORTHERN PACIFIC RAILWAY COMPANY (a
Corporation),

Plaintiff in Error,

vs.

JOHN MARINOVICH,

Defendant in Error.

Stipulation [Under Rule 23].

It is hereby stipulated by the parties hereto that the Clerk of the Circuit Court of Appeals shall print the following parts, only, of the record which are deemed material to the hearing of the writ of error in this case, to wit:

Complaint;

Answer to Complaint;

Reply to Answer;

Judgment;

Assignment of Errors;

Bill of Exceptions;

Order Settling Bill of Exceptions; and this Stipulation;

That in printing the above portions of the record, the designation of the Court, title of the case, verifications and endorsements may be omitted, except on the first page.

GEO. T. REID,
J. W. QUICK, and
L. B. da PONTE,

Attorneys for Plff. in Error.

GORDON & ASKREN,
Attorneys for Deft. in Error.

[Endorsed]: No. 1934. In the United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Ry. Co., Pltff. in Error, vs. John Marinovich, Deft. in Error. Stipulation. Filed Jan. 3, 1911. F. D. Monckton, Clerk.

*In the Superior Court of the State of Washington,
for Pierce County.*

No. 29,771.

JOHN MARINOVICH,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a
Corporation),

Defendant.

Complaint.

Plaintiff above named complains of the defendant above named, and for cause of action herein alleges:

1.

That the Defendant, Northern Pacific Railway Company, is and at all times herein mentioned has been, a corporation, organized and existing under and by virtue of the laws of the State of Wisconsin, and as such owning and operating a railroad for freight and passengers through the town of Mc-Millan, in Pierce County, State of Washington.

2.

That in the conduct of its said business and for the use and accommodation of its passengers and those desiring to become passengers upon its said railroad, said defendant, on May 12th, 1910, and for some time prior thereto, has maintained a station on or near its right of way in the said town of Mc-Millan, Pierce County, Washington.

3.

That on May 12th, 1910, this plaintiff, desiring to

become a passenger upon the next train, southbound, operated by defendant through said town, went to said station at McMillan; that while so waiting for said train at said station, without any fault or negligence on his part, the defendant, through its officers, agents and employees, carelessly and negligently ran and operated a freight train loaded with logs, upon its track adjoining said station, and through its negligence in the operation of said train at an excessive rate of speed, and in the negligent manner the logs thereon were placed, one or several logs were thrown from said train against and upon said station in which said plaintiff was at said time waiting for said southbound train, nearly wrecking and demolishing said station; that said plaintiff was thereby hit by the said logs or the broken lumber in the said station, thereby causing two of his ribs to become fractured on the left side; his scalp to be wounded in two places over and under the right eye about two inches long, the fleshy part of right eye socket torn, contusion of the eye, his scalp at the back to be cut to the skull bone, about four inches long; both bones of his right leg fractured, and tongue nearly cut in two, his shoulder injured, and his right knee joint permanently injured, and causing severe internal injuries. That by reason of his injuries aforesaid plaintiff was rendered insensible for a considerable space of time, and has suffered intense pain on account of said injuries, and that he ever since has been and now is under a doctor's care, that he has been informed by his physician and believes that his injuries are permanent. That he will

be unable to work at manual labor in the future.

4.

That plaintiff is forty (40) years of age and for a number of years past has had steady employment in and around coke ovens at from \$3.50 to \$7.00 per diem.

5.

That by reason of said injuries, plaintiff has been damaged in the sum of Twenty Thousand and no/100 (\$20,000.00) Dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of Twenty Thousand & no/100 (\$20,000.00) Dollars, and for his costs and disbursements.

PETER DAVID,
C. L. WESTCOTT,

Attorneys for the Plaintiff.

[Verified and Endorsed.]

[Title of Court and Cause.]

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff, alleges as follows:

I.

For answer to paragraph I of said complaint, defendant admits that it is a corporation organized and existing under the laws of the State of Wisconsin and owns and operates a railroad for the carrying of freight and passengers in Pierce County, State of Washington.

II.

For answer to paragraph II of said complaint, defendant denies the allegations therein contained.

III.

For answer to paragraph III of said complaint, defendant denies that on the 12th day of May, 1910, the plaintiff desired to become a passenger on defendant's train, southbound, at McMillan, Washington; and denies that plaintiff was injured through the carelessness and negligence of the officers, agents and employees of this defendant; and denies that defendant ran and operated a freight train loaded with logs at an excessive rate of speed at McMillan, Washington; and denies that defendant had negligently loaded the logs on its cars.

Defendant further answering said paragraph, alleges that it has no knowledge or information concerning the nature and extent of plaintiff's alleged injuries, and therefore denies the same to the extent that plaintiff be required to make proof thereof.

IV.

For answer to paragraph IV of said complaint, defendant alleges that it has no knowledge or information concerning the facts therein alleged and therefore denies the same.

V.

For answer to paragraph V of said complaint, defendant denies the allegations therein contained.

Defendant for a further and affirmative defense to plaintiff's cause of action, alleges as follows:

I.

That on the 12th day of May, 1910, the plaintiff

was a trespasser upon either its freight train or upon its right of way and premises at McMillan, Washington, without right or authority, and without the knowledge, consent or acquiescence of the defendant, and at a time when there was no train upon which he could take passage as a passenger, and when there would be no such train for a period of about five hours after the time plaintiff is alleged to have been injured. That at the place where plaintiff is alleged to have been injured was an old abandoned and unused shed upon the right of way of the defendant, which shed was about one hundred (100) feet from the place and building occupied by the agent of this defendant where tickets were sold to persons desiring to become passengers on defendant's trains. That said plaintiff had not procured a ticket for the purpose of riding upon defendant's train, but was upon the premises of this defendant without right of authority and without its knowledge or consent, and not for the purpose of transacting business with the defendant, its agents, servants or employees, and not within a reasonable time prior to the arrival or departure of any passenger train on defendant's line of railway.

Wherefore, defendant prays that plaintiff take nothing by reason of his said action, and that defendant recover its costs and disbursements herein expended.

GEO. T. REID,

J. W. QUICK,

L. B. Da PONTE,

Attorneys for Defendant.

[Verified and Endorsed.]

[Title of Court and Cause.]

Reply.

Comes now the plaintiff and for reply to the further and affirmative defense in defendant's answer contained, admits, denies and alleges, as follows:

Denies that plaintiff was trespassing upon either its freight train or upon its right of way or premises at McMillan, Washington, or elsewhere.

Denies that he was there without the right or authority or without the knowledge, consent or acquiescence of the defendant.

Denies that there was no train upon which he could take passage as a passenger for a period of about five hours after the injury.

Denies all the allegations in said reply contained except as herein admitted.

Alleges that he has no knowledge or information sufficient to form a belief as to whether or not an agent of the defendant sold tickets for passengers on defendant's trains at a place about one hundred feet distant from said station, and therefore denies said allegation. Defendant admits that he had not procured a ticket at the time of the injury.

Wherefore, plaintiff prays as in his original complaint.

PETER DAVID,
C. L. WESTCOTT,

Attorneys for the Plaintiff.

[Verified and Endorsed.]

*In the Circuit Court of the United States, Western
District of Washington, Western Division.*

No. 1659.

JOHN MARINOVICH,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a
Corporation),

Defendant.

Judgment.

At the regular July, 1910, term of said Court.
Present: The Honorable GEORGE DONWORTH,
presiding Judge.

This cause was reached upon the calendar on the 20th day of October, 1910. The plaintiff appearing in person and by J. H. Easterday, R. L. Sherrill, David and Westcott, and Gordon and Askren, his attorneys, and defendant appearing by George T. Reid, J. W. Quick, and L. B. Da Ponte, its attorneys, both parties being ready for trial, a jury was duly impanelled and sworn to try the issues and the respective parties having introduced their evidence and rested, the arguments of counsel having been heard, the jury duly instructed by the Court, retired. And thereafter, on the 25th day of October, 1910, returned into court a verdict finding in favor of the plaintiff John Marinovich, and against the defendant, Northern Pacific Railway, in the sum of Three Thousand Dollars, which verdict was duly received and entered of record.

And thereafter, on the 7th day of November, 1910, said cause coming on to be heard upon the motion of the defendant for judgment notwithstanding said verdict, the Court having heard the argument of counsel, being fully advised, denies said motion, to which ruling the defendant excepts and its exception is allowed. And said cause coming still further on to be heard on defendant's motion for a new trial, the Court having heard the argument of counsel and being fully advised, overrules said motion, to which ruling defendant excepts and its exception is allowed.

NOW, THEREFORE, upon motion of counsel for the plaintiff, it is CONSIDERED, ORDERED AND ADJUDGED, that John Marinovich, plaintiff, do have and recover against the Northern Pacific Railway Company, a corporation, defendant, the sum of Three Thousand Dollars damages, together with ——— Dollars costs as taxed herein, amounting in the aggregate to the sum of ——— Dollars.

IT IS FURTHER ORDERED that defendant be allowed thirty days from the date hereof in which to prepare a Bill of Exceptions and perfect an appeal.

Done in open court, this 10th day of November, 1910.

GEORGE DONWORTH,
Judge.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Nov. 10, 1910. A. Reeves Ayres, Clerk. By Saml. D. Bridges, Deputy."

[Title of Court and Cause.]

Bill of Exceptions.

Be it remembered that on the 19th day of October, A. D. 1910, the above-entitled cause came on for trial in the above-entitled court, sitting at Tacoma, Washington, before the Honorable George Donworth, Judge presiding, and a jury.

M. J. Gordon, J. H. Easterday, Peter David and Charles L. Westcott appearing as attorneys for the plaintiff, and Geo. T. Reid and J. W. Quick appearing as attorneys for the defendant.

Whereupon the following proceedings were had and done and testimony taken, to wit:

The panel of regular jurymen having been exhausted, when eleven members of the jury had been secured, it was stipulated and agreed between the parties, by their respective counsel, that the case should be tried by eleven jurymen, and the Court thereupon ordered that said cause proceed to trial before a jury composed of eleven jurymen.

[Testimony of R. C. Urie, for Plaintiff.]

R. C. URIE, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. GORDON.)

My name is R. C. Urie. I am forty-three years old and reside at Tacoma, Washington. I am a photographer by occupation and have followed that business for twenty-three years. My place of business

(Testimony of R. C. Urie.)

is located at Wilkeson, Washington, and on the 16th day of May, 1910, I took views of the remains of the station-house at McMillin, in this county, and made photographs marked Plaintiff's Exhibits "A" and "B," respectively, and they are correct representations of the premises. (Thereupon said photographs were received in evidence and marked Plaintiff's Exhibits "A" and "B.")

Cross-examination.

(By Mr. QUICK.)

Exhibit "A" shows the track looking east toward Orting, and Exhibit "B" shows the track looking west toward Tacoma.

[Testimony of G. W. Hale, for Plaintiff.]

G. W. HALE, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I am seventeen years old and live with my parents at McMillin. My parents keep a store at McMillin and are in the general merchandise business. I was in McMillin the 12th day of last May, when the station-house was knocked down by logs from the logging-train. I did not see the accident, as I was down on the school grounds, about a block and a half from the station-house, at the time. I heard the noise of the logs and train and with the rest of the children ran up there. When I got there I found a lot of logs on the ground and that the station-house had been torn up by the logs, and I saw the plaintiff

(Testimony of G. W. Hale.)

under the depot. He was on his back and the depot was lying on his chest and I think a log was over his legs. I could not tell whether he was conscious or unconscious, but I know he kept up kind of a talk, but I could not understand it; just hollering. I ran across the track and got a crow-bar from the store and helped to get him out. His face was hurt; his right eye was cut; his face was covered with blood and I could not see what other injuries he had received. My father's store is about 110 feet from this station-house. The station had not been there very long before the accident, but I cannot say just how long it had been there. It was on the right-hand side of the track going toward Orting, and it was just a small frame building with one end closed and used as a warehouse for freight and the other end was used as a waiting-room. This waiting-room had an opening on the side next to the track like a place built for a door, but no door was put in and there were three benches inside which were used for seats. One of the benches was against the wall along the side and the other two against the end walls. This building was about 8 or 9 feet from the track and on each end was painted the word "McMillin."

Cross-examination.

(By Mr. QUICK.)

The station building is located on the railway company's right of way and about 8 or 9 feet back from the nearest rail. It is just a one-story affair, in one end of which they put freight and the other end is a kind of a waiting-room. It was all boxed up with

(Testimony of G. W. Hale.)

the exception of a place left open in the side next to the track for a door, but no door has ever been put in. There were three benches, one across each end and one lengthwise in this waiting-room. There was no agent or person in charge of this building, and railway tickets are sold at our store. My mother is the agent of the company for the purpose of selling tickets and attending to matters of that character. Our store is about 110 feet from this little waiting-room. I was not present at the time of the accident and did not see it. I do not know how old my mother is, but she is somewhere up in the forties and she is the only lady that stays at our store. There is another store at McMillin kept by Mr. Ball, and his boy and sister work in his store. His sister is a young girl about 18 or 19 years old.

Redirect Examination.

(By Mr. GORDON.)

The train came to a stop after the accident, but I could not say how long the train was. I think the accident occurred about 12:30 or 12:45. I saw the train-men there. It was a freight-train with logs and coal, and I think some box cars. I did not notice just how many cars of logs there were, but I think there were four or five and they were in the front part of the train next to the engine. I think something like three logs came off the first car and all the logs came off the rest of them. The logs were scattered all around the building and on both sides of the track. There seemed to be about 40 logs. The accident made a noise like a *crash*, and when I heard

(Testimony of G. W. Hale.)

it I started and went down there. I think the train stopped with the engine about the cattle-guards, not over 300 feet, I would think, from where the station was. The track at this place was straight for about an eighth of a mile from the direction the train was coming.

Recross-examination.

(By Mr. QUICK.)

There were no passenger coaches on this train, and the next passenger train was due through there at about 6:35 in the evening, and this accident occurred about a quarter to one o'clock.

[Testimony of Dr. S. D. Barry, for Plaintiff.]

Dr. S. D. BARRY, being called on behalf of the plaintiff and duly sworn, testified as follows:

I am a physician and surgeon and located at Puyallup, Washington. I have been practicing medicine and surgery since 1905, and am registered in this state. I am a graduate of a medical school in Illinois. I am one of the attending physicians and surgeons at the hospital in Puyallup and was there last May and attended the plaintiff when he was brought to the hospital. He was brought to the hospital about 2 o'clock P. M. May 12, but I first saw him on a Northern Pacific freight train coming in from the east. The distance from McMillin to Puyallup is about 3 miles. When I first saw the plaintiff he was unconscious, and on examination I found that there was a fracture at the upper end of the right leg just below the knee, a fracture of both bones. There was also a fracture of the third and

(Testimony of Dr. S. D. Barry.)

fourth ribs on the right side, and there was a "V"-shaped *insition* just over the eye and another on the side of the eye very near the ball, but not touching the eyeball, and there was a circular wound in the back of the skull about four inches in diameter. They were only scalp wounds, not into the skull, but down to it; the scalp was turned back and there was considerable dirt under the flap. It was easily replaced and no tissue was lost. There was a small incised wound of the mouth and one of the tongue. These are all the injuries I remember. He was under my care the entire time he was in the hospital, which was about six weeks. The injury to the leg was necessarily very painful and the others were also for several days. There was considerable congestion of the eye for two or three weeks, which was rather painful. As soon as he was able to move he was taken from the hospital, but I do not know who has been attending him since. I examined him in the office of Dr. E. M. Brown in Tacoma some two or three weeks after he left the hospital, and that was the last time I saw him.

Cross-examination.

(By Mr. QUICK.)

When he left the hospital he was on crutches. His right leg had not recovered sufficiently to *unable* him to walk on it, other than that his condition was fair. The wounds in the head had healed and there was no evidence that I could determine at that time of any permanent injury to the head. The right leg was stiff at the knee; there was no movement there. The

(Testimony of Dr. S. D. Barry.)

fracture was in the joint and in such cases it is usually permanent. At the time I examined him in the office of Dr. Brown, he was complaining of the lack of the use of both hands, which was determined at the time to be neuritis, due to pressure on the nerves under the arms from wearing his crutches. The right limb had not improved and he had no use of it.

[Testimony of Henry Ball, for Plaintiff.]

HENRY BALL, being called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I live at McMillin and am a merchant, having a store at that place. The little station-house or waiting-room that was knocked down and demolished last May was put in some time last spring; I think in February or March. It was what is commonly known as a blind station. There was a little place on one end for freight and on the other end was a small place, an open shed, with a bench around it for the convenience of people. There are a good many of them throughout the country. I circulated a petition to the railroad company to have them provide this waiting-room, and I think it was put in in February or March. It was about 8 or 10 feet from the track and had the name of the station lettered on each end of it.

Cross-examination.

(By Mr. QUICK.)

This building was located on the right of way and

(Testimony of Henry Ball.)

was about such an affair as you see along the tracks of the street railway. Before it was built the people had no place to get in out of the rain, and for that reason I petitioned the railroad company to construct it. McMillin is a small place with only two stores. People come to the stores and then cross over the track to this building, and before it was put up the women had to stand in the rain, and our idea was to have a place to step in out of the rain when waiting for the train. There was never any agent there, and the Hale store had the agency for selling tickets and has had for 22 years, to my knowledge. Tickets are sold at the Hale store and the store is always open from about a quarter to seven in the morning until about half-past seven in the evening, which is after the evening train. There were two passenger trains each way; one goes down in the morning and is due there about eight, and one goes up at about a quarter to ten, and then in the evening there is a train comes up, leaving Tacoma about five and due at McMillin at 5:36, and another comes down from Buckley, which is due there about half-past six or a quarter to seven; I don't remember the exact schedule. There was no passenger train through there after ten o'clock in the morning until 5:30 in the evening.

Redirect Examination.

(By Mr. GORDON.)

During the twenty-four hours there were four passenger trains, two each way, on this line, and perhaps three local freights and occasionally a through

(Testimony of Henry Ball.)

freight. Of course they are not a regular thing. As to the freight-trains, I cannot say, as I am not well posted. They sometimes run extras or something of that kind, but there were only the four passenger trains, two each way. This logging train was going through at the time of the accident and was not a train scheduled to stop at McMillin. It is not a fact that passengers frequently, with or without a permit, board the freight trains at McMillin, to my knowledge.

[Testimony of Dr. G. G. R. Kunz, for Plaintiff.]

Dr. G. G. R. KUNZ, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I reside in Tacoma, Washington, and am a duly licensed physician and surgeon, and have been practicing my profession for twelve years, the past four years being here in Tacoma.

I saw the plaintiff in the hospital at Puyallup on May 14 of the present year, and made an examination of him. His right leg was in a dressing. He had suffered a fracture of the two bones at a point below the knee; he also had severe laceration over the upper and outside of the right eye, which had been sowed and attended to by Dr. Barry. He also had an injury on the back of his head and severe laceration, and he was also injured in the right side of the chest. There were possibly two ribs broken. His face, of course, was badly swollen and the eye was closed; he was suffering a great deal of pain.

(Testimony of Dr. G. G. R. Kunz.)

I saw him again June 3d. He was then improving and had improved considerably. The wounds in his face and head had improved. The leg was very much swollen, but was in proper position and he was getting on to as good a convalescence as could be expected. That was the last time I saw him until to-day in my office, when I was requested to again examine him. The right leg shows a shortening of an inch. At the seat of the former injury it is enlarged, the circumference being an inch and a half larger than that of the other limb. The leg is somewhat swollen; that is the lower part of it below the fracture, which is most always the case in injuries of that kind. The injuries to the head have healed. The scars are still present, of course. He complains of lack of sensation in his arms, fingers and chest; a lack of strength. The muscles have decreased in size somewhat and he does not have the strength that a man of his ability should have in those muscles. There seems to be some thickening at the point of fracture, and he complains of slight pain upon pressure there. He will always have a short leg, and I believe he will always have some impairment or impediment in the use of each. It will get stronger in time, but may never be quite as strong as it formerly was, and he will suffer from it for some time, and the chances are there will be more or less incapacity. The arms and hands will slowly improve, but I cannot say with any degree of positiveness. I do not know as I could expect a permanent ultimate recovery. The chances are that he will make some improvement

(Testimony of Dr. G. G. R. Kunz.)

at least, but whether he will fully recover his strength I cannot say at the present time.

[Testimony of John Marinovich, on His Own Behalf.]

JOHN MARINOVICH, the plaintiff, being called and sworn in his own behalf, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I am forty years old and was born in Austria. I came to the United States first in 1894; sixteen years ago. I am married and have a wife living in the old country. In the month of May last I was working at Fairfax, ten miles from Wilkeson, for the Fairfax Company and the Tacoma Smelter. I was working as a coke heaver, forking coke into a box-car. I have been doing this for over eight or nine years. I have lived in the State of Washington since 1896, but I went away a couple of times. I took out my first citizenship papers in South Dakota but have never taken out my final papers. I was earning \$3.50 a day before I got hurt. On the morning of the 12th of May I left Wilkeson and went on the train to South Prairie and from there I walked down to McMillan, so that I could see the country, as I was looking for a piece of land. I got to McMillan about noon and went inside the depot there to wait for a train to South Prairie. It was the first time I had ever been there and I did not know about the trains going through there. I wanted to take the first train to South Prairie to see Mr. Joe

(Testimony of John Marinovich.)

Lee. I would buy a ticket or pay on the car, but there was no agent there. I had money to pay my way. I sat down about ten minutes inside the depot then along came a train, run as fast as a passenger train, and logs fell off and smashed the depot and myself. I could not help myself at all; broke my leg, and hurt my shoulder, head and face, and my mouth; my tongue pretty near bit off. I was taken to Puyallup and was in the hospital there fifty-three days and was treated by Dr. Barry and Dr. Kunz. At the time I was hurt I weighed 187 pounds and had never been hurt before.

Cross-examination.

(By Mr. QUICK.)

Q. Where were you on the morning you got hurt, —early in the morning?

A. I was coming from Wilkeson.

Q. Had you stayed in Wilkeson that night?

A. Yes, and worked one day in Wilkeson.

Q. What time did you leave Wilkeson that morning?

A. About twenty minutes to seven.

Q. And where did you go to?

A. To South Prairie.

Q. How did you go to South Prairie?

A. On the train to South Prairie.

Q. And how long did you stay at South Prairie?

A. About two minutes.

Q. Then where did you go?

A. To Joe Lee's Sawmill, and Broomfield, and asked a couple of men loading a car, if Joe Lee at home, and they said no, he was at the logging camp;

(Testimony of John Marinovich.)

and I go to Crocker, and to Orting and McMillan.

Q. Did you walk all the way? A. Yes.

Q. On the railroad track?

A. Yes, and on the wagon road too.

Q. How much of the distance did you walk on the railroad track? A. Not far.

Q. Well, how far; did you walk from South Prairie to Crocker on the railroad? A. Yes.

Q. And then from Crocker to Orting, did you walk on the railroad?

A. Some on the railroad and some on the wagon road.

Q. And from Orting to McMillan?

A. Walked some on the wagon road.

Q. But most of the way on the railroad, didn't you, or part of the way?

A. Some parts on the wagon road and some parts on the railroad.

Q. About what time did you get to McMillan?

A. Before noon.

Q. What did you go to McMillan for?

A. Looking to buy a piece of land.

Q. Had anybody told you of a piece of land there at McMillan?

A. I came to look out what kind of land to buy.

Q. Did you talk to anybody about land on your way down?

A. No, no; just one man; he said that nobody was at home.

Q. Did you talk to anybody at Orting?

A. No.

(Testimony of John Marinovich.)

Q. Did you talk to anybody at Crocker?

A. I never saw anybody there, only the section-man.

Q. Did you talk to anybody at McMillan?

A. Nobody there, only one store.

Q. Did you go to the store?

A. Yes, and bought lunch too.

Q. Who did you see there? A. One girl.

Q. That is the girl in the store you bought the lunch from? A. Yes.

Q. Did you ask her anything about the trains?

A. I asked her what time the train, and sometimes it comes along and sometimes not. She said it comes along sometimes.

Q. That was all she said? A. Yes, sir.

Q. She did not tell you when it would come?

A. No; did not say at all what time it come.

Q. She just said it would come along some time.

A. Yes.

Q. What did you do with your lunch?

A. I ate him.

Q. You took it down to the depot and ate it?

A. I ate it by the corner of the fence, by the side-track, and went to the depot five or six minutes.

Q. Did you talk with anybody else except the girl? A. No; nobody else.

Q. Did you see any man up there and talk with him? A. No.

Mr. QUICK.—Will Mr. Ohls please come forward? (Gentleman comes forward.)

Q. Did you see this man there at McMillan and talk to him?

(Testimony of John Marinovich.)

A. I don't know now; that is a long time.

Q. Didn't you talk to him in the Austrian language?
A. No, sir.

Q. Didn't talk to him there?
A. No, sir.

Q. Didn't you borrow ten cents from him to get lunch with?

A. No, sir. Had plenty of money in my pocket.

Q. You didn't get ten cents from this gentleman to buy lunch with?

A. No, sir; if I did that, you may take my head off.

Q. Didn't he want to hire you to work for him?

A. No, sir.

Q. Didn't he tell you he would give you a couple days work?

A. Not to me; I did not see him.

Q. Never saw him?

A. No, sir; never saw that man before now.

Q. How many of the stores were you in at McMillan?
A. Two stores.

Q. Were you in both of them?
A. No.

Q. Just to one store where the girl was?

A. Yes.

Q. Did you ask to buy a railroad ticket of anybody?
A. No.

Q. You did not inquire about a railroad ticket?

A. Nobody at the depot.

Q. Did you ask for the agent?

A. No agent there.

Q. Did you ask this girl where you could find the agent?

(Testimony of John Marinovich.)

A. There was no agent; the depot was over on the other side of the County Road. The sign was there on the station; nobody there.

Q. Did you ask the girl where the agent was?

A. No agent there.

Q. You just asked her when the train would come?
A. Yes, that is all.

Q. Can you remember just what you did ask her?

A. I asked her for lunch, and I said what time come the train to South Prairie, and she said, "I don't know; sometimes come, and the train sometimes no come."

Q. Sometimes it comes on time and sometimes it don't?

A. Sometimes come a train and sometimes don't.

Q. Where were you when this log train came?

A. I sat down in the depot; was going in the door.

Q. Did you see the train coming?

A. Yes, and the logs fell off right away.

Q. Did you see the train coming down the track before it got there?

A. I saw it just coming close to the door.

Q. Had you been sitting in the depot before?

A. About five minutes, that is all.

Q. Did you go out of the door as the train came up?
A. No; inside.

Q. You were sitting there on the bench when the log struck you?
A. Yes.

Q. If you were waiting for the train and heard one coming, why didn't you go out to see what train it was?

(Testimony of John Marinovich.)

A. The log fell off and go against the door.

Q. The logs didn't fall off until after the engine passed the depot, did they, and part of the train?

A. I no see myself.

Q. You didn't see it at all? A. No.

Q. You were there waiting for the train?

A. Yes.

Q. And heard this train coming?

A. It was coming.

Q. But you did not go out to see if it was the train for you?

A. It just come close to the door, never whistled or anything.

Redirect Examination.

(By Mr. GORDON.)

Q. How much money and what property do you own?

Mr. QUICK.—That is objected to as immaterial.

The COURT.—Objection overruled; exception allowed.

Q. What property do you own?

A. About three or four hundred dollars.

Q. In money? A. I have some money too.

Q. How much money?

A. I don't know now. I had pretty good-sized money home.

Q. Did you own property in the old country?

A. I have some.

Q. What? A. A farm.

Q. Where your wife lives? A. Yes.

Q. How much money do you send back home, if

(Testimony of John Marinovich.)

any, in the last year?

Mr. QUICK.—That is objected to as immaterial.

The COURT.—Objection overruled, exception allowed.

Q. How much?

A. No send any last year.

Q. What did you do with your money last year?

A. Spent it for myself; no work last year much; I was laid off; they shut down fifty or sixty ovens there.

Q. How much money did you have at the time you were injured, in your pocket?

A. About \$25.00. A ten dollar bill pinned in the pocket, in the handkerchief, and in the side pocket in front; and \$5.00, two gold pieces, ten dollars gold, in the front pocket, and over \$5.00 silver.

Q. Where did you get that money and when?

A. I saw some man in Wilkeson. I have two men who gave me \$10.00 gold for the bill.

Q. Are you a drinking man?

A. No, sir. I drink sometimes a couple of glasses; that is all.

Q. Had you been drinking that day?

A. Just one glass; that is all.

Q. What? A. Beer.

Q. Where? A. St South Prairie.

Q. Did you ever get drunk?

A. No, sir; never seen myself drunk. Joe Lee and Broomfield and Guss saw me, and Jack Laughlin.

Q. How do you send money home when you send

(Testimony of John Marinovich.)

it? A. Through the postoffice.

Q. Have you the receipts for any money?

A. Yes.

Q. Where are they? A. In my pocket.

Q. Here? A. Yes, sir.

Mr. QUICK.—I would object to any offer of that as incompetent and immaterial.

The COURT.—Objection overruled; exception allowed.

Mr. GORDON.—I show you Plaintiff's Exhibits "D," "E" and "F"; did you ever see these before?

A. Yes.

Q. Where did you get them; did you ever have them? A. I got them at Carbonado.

Q. Did you pay money for these?

A. Sure.

Q. Where were you sending the money represented by them? A. Home.

Q. To your wife?

A. Yes; to my partner, and he gave to my wife.

Mr. GORDON.—We make the offer of these Exhibits "D," "E" and "F" as evidence.

Mr. QUICK.—Objected to as immaterial.

The COURT.—Objection overruled; exception allowed.

Whereupon said receipts were received in evidence and marked as Plaintiff's Exhibits "D," "E" and "F" respectively.

Recross-examination.

(By Mr. QUICK.)

Q. You intended to walk back to Orting and take

(Testimony of John Marinovich.)

the train there? A. No, sir.

Q. Do you remember the claim agent of the railroad company seeing you while you were in the hospital at Puyallup?

A. I don't know at that time what you were talking; I could not talk myself.

Q. Do you remember this man here? (Refers to Mr. J. E. Newton.)

A. I don't know him.

Q. Did you see him in the hospital while you were there?

A. Lots of men come in the hospital all the time.

Q. Oh, yes, lots of lawyers. But did you see the claim agent?

A. Some men were coming, I don't know.

Q. You don't know whether you saw this man or not?

A. You see my eye was closed up; I had only my left eye. Men came just like him.

Q. Do you remember the nurse who waited on you? A. I cannot tell the name.

Q. Do you remember the nurse who waited on you while in the hospital?

A. I don't know for that.

Q. Didn't you tell this man, the claim agent here, and the nurse, that you were going to walk back to Orting, and take the train from Orting?

A. I could not walk when the log killed me.

Q. Didn't you tell him you intended to walk back to Orting from McMillan, and take the train at Orting that evening?

(Testimony of John Marinovich.)

A. I don't know; not myself talking that.

Q. Did you tell this man that, and the nurse?

A. No, sir, I was sick; I did not know what it was you were talking about.

(Witness excused.)

[Testimony of Arthur Tucker, for Plaintiff.]

ARTHUR TUCKER, being called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I live at Wilkeson and am foreman of the coke ovens for the Wilkeson Coal & Coke Company. The plaintiff worked for me about two years ago for about three or four months and then came back and worked another time; I do not remember how long. He was a good worker and his wages generally averaged about \$3.00 a day.

[Testimony of Charles Broomfield, for Plaintiff.]

CHARLES BROOMFIELD, being called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I reside at South Prairie and have been in the saw-mill business lately. Previous to that I was a foreman for the Wilkeson Coal & Coke Company at Wilkeson and had charge of the bunkers. The plaintiff worked for me forking coke into the box-cars. His work was contract work and some days he would make \$2.50 and sometimes perhaps close to \$4.00.

(Testimony of Charles Broomfield.)

Cross-examination.

(By Mr. QUICK.)

I think it is about seven miles from South Prairie to Orting and about the same distance from Orting to McMillin.

[Testimony of Pascoe Boskovich, for Plaintiff.]

PASCOE BOSKOVICH, being called and sworn on behalf of the plaintiff, testified as follows, through the interpreter, Prosper Jurich.

Direct Examination.

(By Mr. GORDON.)

I live at Wilkeson and have lived there seven years. I have known the plaintiff for a long time; I knew him in the old country and also here in America. I saw him about five o'clock in the evening the day before he was hurt. He was at Wilkeson and I gave the driver, George Morris, a \$10.00 bill and the plaintiff gave Morris \$10.00 in gold for it. He wanted the paper money so that it would be easier to carry along with him. I saw that he had more money in his handkerchief, but I do not know how much.

[Testimony of A. R. Kalles, for Plaintiff.]

A. R. KALLES, being called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I am twenty-two years old and have lived at McMillin for the last seventeen or eighteen years. I was at McMillin last May when the station was knocked down by logs falling from the train. I was

(Testimony of A. R. Kalles.)

about two hundred feet south of the track at the time. The top log rolled off the front car. The front end of the log struck the ground and the other end remained on the car and pushed the logs off the other cars and three big logs hit the depot. When I got there one log was laying on the legs of the plaintiff and the building was resting on his breast. The building after it was knocked down looked just as shown in plaintiff's Exhibits "A" and "B." The building was about 12x18 feet and about twelve feet on the north end was for freight and the south end was used for a waiting-room and had three benches in it and an opening on the side next to the track. There was no platform in front of it, but there was two six by twelves with the gravel banked up between them. The word "McMillin" was painted on each end of the building. I helped take the plaintiff out and he was taken away in the caboose in the direction of Puyallup, and that is the last I saw of him.

Cross-examination.

(By Mr. QUICK.)

The train was coming from the east toward Tacoma and the engine had passed the depot before the logs rolled off the car. The track there is straight and level.

**[Testimony of John Marinovich, on His Own Behalf
(Recalled).]**

JOHN MARINOVICH, the plaintiff, being recalled, testified as follows:

Redirect Examination.

(By Mr. GORDON.)

Q. John, can you read English? A. No.

Q. Did you lose any papers in a fire, and if so when and where?

A. I lost some in a boarding-house in California.

Q. How long ago? A. Last year.

Q. What kind of papers?

Mr. QUICK.—We object to this.

The COURT.—Objection overruled; exception allowed.

A. Money order for postoffice papers, for the old country.

Mr. GORDON.—I want to show receipts for money forwarded by postoffice orders, of later dates, than those already offered, were burned, with his naturalization papers.

Mr. QUICK.—We object as immaterial and incompetent.

The COURT.—Objection overruled; exception allowed.

A. They were postoffice money orders.

Recross-examination.

(By Mr. QUICK.)

Q. You say you cannot read? A. No, sir.

Q. Can you write?

(Testimony of John Marinovich.)

A. No, never was in school myself.

Q. Do you remember while you were in the hospital at Puyallup and on or about the 17th or 18th day of May, that Mr. Newton, the gentleman who was standing here yesterday, was there talking with you; do you remember him writing on a paper like this?

A. I couldn't do it, no, sir.

Q. Do you remember Miss LePlante, the nurse sitting back there? A. Yes, sir.

Q. Was she there at the time the paper like this was written?

A. I saw a man looking, and not looking at me.

Q. But do you remember her being present when a paper like this was written out by Mr. Newton?

A. I saw some paper.

Q. And didn't you ask her to sign the paper after Mr. Newton had read it over to you?

A. Yes, he said, "Sign"; I could not read.

Q. And didn't you tell Mr. Newton and Miss LePlante that you were going to walk back to Orting, and take the train from Orting? A. No, sir.

Q. You did not tell that?

A. Well, I don't know; I be pretty sick; I don't know what I talked myself at that time.

Q. You claim you don't know what you said at that time?

A. Sure; I was pretty sick myself.

(Witness excused.)

[Testimony of Dr. E. M. Brown, for Plaintiff.]

Dr. E. M. BROWN, being called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I am a physician and surgeon; been practicing my profession since the summer of 1879, and since 1885 in Tacoma. I examined the plaintiff first at my office about two months ago and again to-day. I found that he had trouble in his right leg, indicating a fracture.

The fracture was in the upper part of the leg, that is of that part below the knee. Whether there was more than two fractures I could not tell from the examination, as he was swollen, so that he may have had what we call comminuted fracture, that is several fractures, or only a fracture of each bone. The leg was shortened between the knee and the ankle, about an inch, and it was bowed out, so that it threw the center of the weight of the body on the outer side of the center of the foot, tipping the foot out which I consider in his case, at that time and to-day, both, his chief injury. The shortening making it necessary for him to limp more or less, but the weight of the body being sent down to the ground through the outer part of the foot instead of over the true center arch, and to-day in measuring that, I find that the outer malleolus or the tip of the ankle bone, is a half an inch lower than it should be, but that half inch is in addition to the inch of shortening that I spoke of before. There is about an inch of shortening be-

(Testimony of Dr. E. M. Brown.)

tween the upper and lower end of the leg bones, and then the outer bone on account of the canting of the foot out, similar to what takes place in a flat foot, when the weight is more on the outer side, there is a lowering there of about a half an inch. So that when he stands up the lower ankle bone is nearly an inch lower, nearer the ground, than it was a few months ago.

There was a difference in the size of the leg, on account of the swelling; there is a slight difference in the size of the leg on that account.

Approximately an inch. The injured leg below the knee is swollen; while the right leg above the knee, that is, the injured leg above the knee, is about the same amount smaller, that is about an inch, over the thigh muscle, either from nonuse or possible injury to the nerve.

His arms seem to be impaired in their use. The muscles of the arm are small for a laboring man, but I cannot say that there is much difference between the two arms in size, measuring around the upper part. In moving the arms he does it with a good deal of mental effort. That is, you put him through certain motions and have him move his arms in a certain way, and he does it easier after a little. And you make a little variation in the movement and it takes a long time for him to adjust himself to it. Whether that is from injury to the origin of the nerves in the back of the neck, or merely injury coincident to the injury as a knock on the back of the head, I cannot tell. Possibly there may be more or

(Testimony of Dr. E. M. Brown.)

less trouble from the pressure of the crutches.

There are indications of a cut in the scalp, in the back of the head, and some marks in the front part, but I didn't take any note of those. I only had a few minutes, and did not locate them.

I could not at this stage give a prognosis. He may be a great deal better in a year or two. He will always have shortening of the leg, and the tipping out of the foot, so that I would expect him to have at least a bad ankle. So far as the fracture of the leg, the upper part of the leg, that is less dangerous trouble than the ankle. It is on account of the false bearing throwing the weight of the body in the wrong direction, and the trouble he will have from the limb interfering with work, will always be just the same as it is now.

As to his arms, it is too soon to give any opinion. That all may pass away as he gets more used to crutches, or can throw them away.

The chief difference that I remember aside from the swelling and about the ribs,—I don't remember what that was, but the appearance seems to be less. The ankle is more out of shape than then. The swelling in the leg is perhaps better, and the wasting of the leg above the knee is more evident. That is, there was not the difference then between the two legs above the knee that there is now.

(Plaintiff rests.)

Defendant's Motion for a Nonsuit, etc.

Mr. QUICK.—The defendant at this time moves the Court to discharge the jury and grant a nonsuit

dismissing this cause at the cost of the plaintiff, for the reason that the evidence fails to prove a cause of action on behalf of the plaintiff, and for the further reason that the evidence affirmatively shows that the plaintiff was not a passenger at the time he was injured and is not entitled to recover.

Which motion, after being argued by counsel, was by the Court denied and the defendant allowed an exception to the ruling of the Court.

Defense.

[Testimony of J. E. Newton, for Defendant.]

J. E. NEWTON, being called and sworn as a witness in behalf of the defendant, testified as follows:

I am claim agent for the Northern Pacific Railway Company and have held that position for the past eleven years. I called on the plaintiff twice while he was in the hospital at Puyallup. The first time was within a day or two after the accident and the second visit was about two weeks later, as I remember. I think the dates were Monday the 16th of May and Saturday the 21st of May that I saw him. At the first visit Dr. Barry and the nurse, Miss LaPlante, were present and on the second visit Miss LaPlante was present. At the time of the second visit I talked with the plaintiff and he said that he was going to walk back to Orting from McMillin and take the train at Orting. At the time I talked with him he talked well, spoke and understood English well and seemed to be in normal condition and at ease.

(Testimony of J. E. Newton.)

Cross-examination.

(By Mr. GORDON.)

I had this conversation with the plaintiff at the time of my second visit on Saturday the 21st of May. We talked about the accident and I took his statement in writing as to the way the accident occurred. I was with him perhaps half an hour in the sick-room at the hotel. I made the second visit at the request of Dr. Barry.

“Q. Did you prepare a statement and ask him to sign it? A. I wrote the statement; yes, sir.

Q. Did he sign it?

A. I don't think he did. I don't think he signed it.

Q. In that statement he is represented as saying that he intended to walk back from McMillin to Ort-ing? A. That is what he said.

Q. That is in the statement?

A. That is to the best of my recollection.

Q. How long were you with him on the occasion of the first visit?

A. Not to exceed five minutes.”

[Testimony of Miss LaPlante, for Defendant.]

Miss LAPLANTE, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. QUICK.)

I was a nurse in the hospital at Puyallup at the time the plaintiff was brought to the hospital and I waited on him while he was there. I remember the

(Testimony of Miss LaPlante.)

occasion of Mr. Newton, the claim agent, being there at the hospital, and he called me into the room where the plaintiff was and he had a written statement prepared at the time I went in. He then read the statement over to the plaintiff and asked questions about it and he asked the plaintiff if he was going to walk back to Orting and he said he was. I heard the statement read over to the plaintiff by Mr. Newton and plaintiff affirmed it. (Handing witness paper.) This is the written statement and this is my signature at the bottom. I signed it as a witness. The plaintiff requested me to do so. I did that after Mr. Newton had read it to the plaintiff and the plaintiff said it was correct.

(Paper identified by witness introduced in evidence as Defendant's Exhibit #1.)

Q. "I will ask you if you remember Mr. Newton reading to him the following from this statement: 'It was my intention to walk back to Orting to get my dinner—(Interrupted by Mr. Gordon.)

We object to this for the reason that the witness stated she heard the paper read and heard him assent to it and that she signed it as a witness at his request.

The COURT.—Objection overruled.

A. Yes, sir, he pointed it out to me and told me to take notice of it; that is one statement that he wanted to make clear.' "

The plaintiff was in an apparently normal mental condition at the time and had been so ever since he came out from the anaesthetic. I saw the plaintiff first probably an hour and a half after he was

(Testimony of Miss LaPlante.)

brought to the hospital. Mr. Bair and I examined his clothing and I went through the pockets to see if we could find his name and what effects he had on him. I found a paper giving his name, some matches, a handkerchief or two but no money. This is the paper I found in his clothing with his name on it. (Paper marked Defendant's Exhibit #2.)

Cross-examination.

(By Mr. GORDON.)

This paper was found in a pocket in his coat. He was able to talk very well right after he came out of the anaesthetic, but he does not talk very good English, but I could understand him very well by listening closely.

“Q. You were listening very closely to hear what the claim agent was saying to him and he to the claim agent? A. Yes, sir.

Q. Now, isn't it a fact that he could not understand long sentences and will say yes and no?

A. No. We would sometimes have to make things clear to him.

Q. Seemed to have considerable difficulty in understanding a long sentence?

A. Unless it was plain to him.

Q. And haven't you frequently known him to say yes when he intended no, and you knew he intended no? A. No, I don't know as I have.”

The plaintiff was brought to the hospital some time in the afternoon and about an hour before I saw him. He was under the care of Dr. Karshner and Dr. Barry. All classes of patients are treated at the

(Testimony of Miss LaPlante.)

hospital and sometimes the Northern Pacific Railway sends patients there in case of an accident of this kind, but the railway company has nothing to do with the hospital. I think plaintiff was in the hospital about three months and for the first week he was there the doctors saw him every day and sometimes twice a day; he was in a very critical condition.

Redirect Examination.

(By Mr. QUICK.)

Q. "You say that when matters were explained to him he seemed to understand them thoroughly?

A. He did.

Q. What effort was made by Mr. Newton to explain to him this writing?

A. He made it clear if he did not understand it.

Q. Did he re-read any parts of it to him?

A. Yes, sir.

[Testimony of Gus Ohls, for Defendant.]

GUS OHLS, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. QUICK.)

I reside at McMillin and have resided there about three years. I was born in Germany and speak the German language. I can also speak the Austrian language but not very plain. I understand it better than I speak it. I remember the day the plaintiff was injured and I saw him before the accident, probably between eleven and twelve o'clock down by the depot. I talked with him there in regard to

(Testimony of Gus Ohls.)

employing him to work. The plaintiff said he did not want to work on a farm and was not looking for farm work. I do not recollect about giving him any money; as to that I would not say yes or no; there are so many going up and down the railroad I cannot swear to it. I think we were talking about money, but I don't remember. I don't think I gave him any. The plaintiff inquired about the camps, logging camps and also about coal camps and said he was pretty tired. He was talking about Crocker and Bloomfields and then he wanted to know about the St. Paul camps; they are big logging camps. I did not ask him if he was going out to them and he did not say; only said he was tired. When he left me he went over to Harry Ball's store. I saw him afterward sitting in the waiting-room; he was sitting like this (indicating), leaning his head on his hand. That was probably fifteen or twenty or twenty-five minutes before the log train came.

Cross-examination.

(By Mr. GORDON.)

I saw him go to Ball's store and he came out and went into this little waiting-room and had been there a few minutes when the train came along and the accident happened. He talked with me something about the price of land was an acre and I told him and he said it was too high, too much money.

[Testimony of C. P. Ronan, for Defendant.]

C. P. RONAN, being called as a witness on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. QUICK.)

I am a conductor for the Northern Pacific Railway Company and have been employed by the defendant for seven years and a half. I was conductor in charge of the log train at the time the plaintiff was injured. I had been on that run about seven or eight days before the accident. I have handled log trains at different times and was a brakeman on a logging run for thirteen months. We picked up these cars of logs that were in the train at the time at Morris' Spur on the Crocker Branch. The logs are not loaded on the cars by the railroad company but are loaded by the Morris & Brew Logging Company. They are extensive shippers of logs and generally ship about four to six cars a day from that spur. I examined the cars before we took them out and they all appeared to be loaded in first class shape. When we find a car of logs that is not properly loaded, we set it back for reloading and require the shipper to reload it before we take it out. I examined the cars again at Orting and they were in an apparently good condition; they appeared to be all right. The two brakemen, Mr. Dougherty and Mr. Snyder, were with me. Logs that are properly loaded will sometimes slip from a train when it is in

(Testimony of C. P. Ronan.)

motion. I have seen that occur several times. This is sometimes caused by the irregular surface of the log and sometimes logs are spikey and the motion of the train will work the pins out. I did not see the accident, as I was in the last car making out my report at the time. This train was not scheduled to stop at McMillin and would not have stopped there except for the accident. The track at that place is straight and in good condition and the train was running about twelve or fifteen miles an hour. This is not a high or excessive rate of speed for that train. I examined the train after the accident, but could not determine just what caused the logs to go off. I could not see anything that would cause the accident. This train does not carry passengers and there would be no train through there that would carry passengers until the regular passenger train in the evening; I think about six o'clock.

Cross-examination.

(By Mr. GORDON.)

An occurrence like this for logs to slip from the train is rather unusual and does not often occur. There were five cars loaded with logs and they were together in the front end of the train. They had been picked up two miles east of Crocker on the Crocker Branch, which I think is about ten miles from McMillin. The train was brought to a stop after the accident and the plaintiff was brought in to Puyallup. There were no passengers on the train and it was the invariable custom not to carry passengers on that train and I never did. My brakemen

(Testimony of C. P. Ronan.)

were Snyder and Dougherty and they examined the cars at Orting also. It is three miles from Orting to McMillin and eight miles from Orting to South Prairie. There was no telegraph operator at McMillin.

[Testimony of E. Snyder, for Defendant.]

E. SNYDER, being called as a witness on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. QUICK.)

I was one of the brakemen on this train at the time plaintiff was injured. I had been on that run but six or seven months and was familiar with the manner in which logs should be loaded for transportation by railroad. I was not present when the logs were picked up, but I examined the cars at Crocker and looked them over to see if they were properly loaded. I found them in good condition and they were loaded in the customary way for loading logs. I also examined the cars at Orting and found them in the same condition. Where we picked up the cars it is on a grade and we turned up the retainers that hold the pressure in the brake cylinders, and when we got to the foot of the hill at Crocker we turned down the retainers and looked the logs over to see that none of them were misplaced or worked loose, so by doing that I was familiar with the condition of the logs and had an opportunity to make a more careful inspection. At Orting we do switching and sometimes handle the cars a little roughly and I

(Testimony of E. Snyder.)

looked them over again to see if they were in good condition before leaving, and I did that on this trip and found them apparently all right.

Cross-examination.

(By Mr. GORDON.)

Q. "Whose duty is it to make this inspection at Crocker?

A. Any of the trainmen there who are employed on the train.

Q. And at Orting? A. The same.

Q. In other words, it is for the train crew to see that the loads are sufficiently safe?

A. That the logs are in a safe condition to handle.

Q. And properly protected in moving the train?

A. Yes.

Q. What was the number of your train?

A. I don't remember; I think it was extra—Well, I don't have the same engine every day.

Q. Was it a regular carded train or extra?

A. It was an extra train, and the extras are designated by the number of the engine.

Mr. QUICK.—Q. This train was not scheduled to stop at McMillin and did not carry passengers? A. No, sir.

(Witness excused.)

[Testimony of W. J. Dougherty, for Defendant.]

W. J. DOUGHERTY, being called as a witness on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. QUICK.)

I was employed as a brakeman on the train at the time of the accident at McMillin. I have been in the train service for about twenty years and off and on for about fifteen years have been handling trains that haul logs, and I am familiar with the customary way of loading logs for transportation by rail. I examined these logs when we picked them up at the spur and they were loaded in the ordinary way and appeared to be safely loaded. When we find a car that is not properly loaded, we set it back to be re-loaded by the logging company. The railway company has nothing to do with the loading of the car. I again looked these cars over at Orting and they appeared to be in the same condition as when we picked them up. The train was going about fifteen miles an hour at the time of the accident.

Cross-examination.

(By Mr. GORDON.)

Q. How long were you in Crocker that day?

A. Just long enough to get orders to run from Crocker to Orting.

Q. Not being a carded train you were running on orders? A. Yes, sir.

Q. About how long did you have to wait?

(Testimony of W. J. Dougherty.)

A. About, probably, thirty minutes I would judge.

Q. You stopped at Orting and did switching there? A. Yes, sir.

Q. How long did you stop at Orting?

A. Probably about 45 minutes.

Q. Do you know about what time you left Orting?

A. It was close to 12 o'clock; about 12, I would say.

Q. What was your next stop under your running orders? A. At Meeker Junction.

(Witness excused.)

Defendant rests.

[Recital Re] Motion of Defendant for Directed Verdict.

At the close of all the evidence in the case, defendant moved the Court to instruct the jury to return a verdict in favor of the defendant, for the reason that the plaintiff is not entitled to recover judgment against the defendant under all the evidence in the case, and for the further reason the evidence affirmatively shows that the plaintiff was not a passenger at the time of his injury.

Which motion was by the Court overruled, to which ruling of the Court defendant excepted, which exception was by the Court allowed.

Whereupon, after argument of the case to the jury by the respective counsel, the Court charged the jury as follows, to wit:

Charge to the Jury.

Gentlemen of the Jury:

The occurrence which gives rise to this controversy was in the month of May of the present year at a place called McMillin, in Pierce County, in this State.

It is admitted that at that time the defendant company operated a railroad line extending through McMillin.

The plaintiff bases his right to recover compensation in this case upon the fact that he was in this building which has sometimes been called a waiting-room and sometimes a station, I think, for the purpose of taking passage as a passenger upon the next southbound train. That is one of the important allegations in the complaint and the truthfulness or want of truthfulness of that allegation is one of the important questions in the case. If you find that the plaintiff was in the station, in the building, whatever it may be called, and that that building was provided by the company as the waiting-room for intending passengers, and if the plaintiff was in that building with the intention of taking passage upon the next train, then if certain other circumstances concur, which I will state in a moment, he would be entitled to the rights of a passenger, but if you find that he was in that building for some other purpose, not with the *bona fide* intention of taking the next train south bound as he alleges, but for some purpose foreign to that, for instance if he was there merely to rest or preparatory to walking upon the right of way of

the company to some other point, or for any other purpose other than that of an intending passenger upon the next train of the company, then your verdict would be for the defendant regardless of any other fact in the case. That is the cause of action that the complaint alleges. There is no question here of what degree of care the defendant company would owe to a licensee or trespasser, because that is not the case we are trying. The first question, therefore, for you to determine, is with what intention was the plaintiff within the building at the time of the occurrence in question. If he was in the building with the intention of taking passage upon the next train, were the circumstances such that he was entitled at the time to the rights of a passenger in that building; I say, were the circumstances such that this conclusion followed. In order to constitute one a passenger, he must go to the place provided by the carrier,—in this case the railroad company,—for the reception of passengers, and in such a case he is entitled to the use of the station facilities for a reasonable time before the departure of the train in which he intends to take passage. During such reasonable time he is a passenger to all intents and purposes, and entitled to the rights of a passenger. One question, therefore, perhaps the next important question that you have to pass upon, is, was he there within a reasonable time; that is, was the time at which he was there a reasonable time for a *bona fide* intending passenger to be there before the departure of the next train. It is not the policy of the law to require railroad companies to maintain their sta-

tion facilities for the benefit of persons who at some future time expect to become passengers; there must be some limit as to the right of a person to use a station with the obligations, or rather with the rights, of a passenger. Now, the law does not fix that limit by any number of minutes or any number of hours or in any other way, it says a reasonable time. What is a reasonable time is a question in this case of fact for you to determine. It depends upon the circumstances of the case. The circumstances here are more or less contested. I will not undertake to state the circumstances *pro* and *con*. They have been argued by counsel and appear in the evidence. It is for you to say under all those circumstances whether at the time of the occurrence it was a reasonable time for the plaintiff to be there intending to take passage upon the next train. If he was there more than a reasonable time before the departure of the next train, then he would not be entitled to the rights of a passenger and your verdict would be for the defendant. Of course the fact that he had been there beyond a reasonable time would not of itself cut any figure. The question is at the time of the occurrence, taking all the facts and circumstances into consideration, and the time of the departure of the next train, was he within the reasonable time when the occurrence happened.

The rule of care, the degree of care which the law imposes upon carriers of passengers is a higher degree of care than that which is imposed in the ordinary transactions of life. If you find that the plaintiff was entitled to the rights of a passenger at the

time of this occurrence, then it becomes important for you to consider whether the defendant was negligent within the rules of law applicable to passengers, and whether the negligence of the defendant caused injury to the plaintiff, because in order for the plaintiff to recover, it must appear that he was entitled to the rights of a passenger, and that the defendant was negligent within the rule applicable to passengers, and that that negligence caused the injury of the plaintiff.

Where a passenger is carried on the line of a railroad and if he is entitled to the rights of a passenger, the rule is the same. The rule requires the carrier to exercise the utmost care so far as human skill and foresight can go with respect to the cars and other appliances on which the safety of the passengers depend, and if by reason of the slightest negligence in this respect on the part of the carrier the passenger is injured, the carrier will be liable. The carrier is bound to exercise the strictest vigilance in receiving a passenger and conveying him to his destination, and setting him down safely which the means of conveyance employed under the circumstances of the case will permit. The degree of care required of the carrier is not the utmost and highest absolutely, but the highest which is consistent with the nature of the carrier's business, having due regard to the necessary requirements of the business on the one hand, and the necessary requirements for the safety of passengers on the other hand. Applying that rule, if the plaintiff was entitled to the rights of a passenger, does the case show negligence on the

part of the defendant.

If you should find that the plaintiff being in the waiting-room and entitled to the rights of a passenger, was struck either by a log or by portions of the building and that the occurrence was caused by the falling of a log off of one of the passing trains of the defendant company, then that fact would be *prima facie* evidence of negligence on the part of the defendant, because usually when trains are operated with ordinary care, such occurrences do not happen and such an occurrence unexplained would be sufficient evidence of negligence of the defendant, so that if that negligence was the cause of the plaintiff's injury, he would be entitled to recover; but the burden is upon the plaintiff on the whole case to prove by a preponderance of the evidence the negligence of the defendant. You have heard the evidence as to how the accident did occur, as to the various steps, acts and conduct of the various employees of the defendant, and all the facts and circumstances, and it is for you to say whether upon all the evidence in the case the plaintiff has shown by a preponderance of the evidence the negligence of the defendant and that that negligence caused the injury to the plaintiff.

Thereupon the jury having received the charge of the Court, retired to consider their verdict.

[Recital Re] Verdict.

Thereafter the jury returned into open court with a verdict in favor of the plaintiff for damages against the defendant in the sum of \$3,000.00.

Now, in the furtherance of justice and that right may be done, the defendant presents the foregoing

as its bill of exceptions in this cause, and prays that the same may be settled, allowed, signed and certified by the judge as provided by law and filed as a bill of exceptions.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Defendant.

[Admission of Service of Bill of Exceptions.]

Service of the foregoing bill of exceptions and receipt of copy thereof is hereby acknowledged this 14th day of December, 1910.

DAVID & WESTCOTT,
J. H. EASTERDAY,
GORDON & ASKREN,
Attorneys for Plaintiff.

[Endorsed.]

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

Now, on this 19th day of December, 1910, the above cause coming on for hearing on the application of the defendant to settle the bill of exceptions in said cause, defendant appearing by J. W. Quick, its attorney, and the plaintiff appearing by Gordon & Askren, his attorneys, and it appearing to the Court that the defendant's proposed bill of exceptions was duly served on the attorneys for the plaintiff within the time provided by law and that no amendments have been suggested thereto and that counsel for plaintiff have no amendments to propose, and that

both parties consent to the signing and settling of the same, and that the time for settling said bill of exceptions has not expired; and it further appearing to the Court that said bill of exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto and all the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions and the clerk of this court is hereby ordered and instructed to attached the same thereto;

Therefore, upon motion of J. W. Quick, Esquire, attorney for defendant, it is hereby

ORDERED that said proposed bill of exceptions be and the same is hereby settled as a true bill of exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct bill of exceptions, and the clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of the Appeals for the Ninth Circuit.

GEORGE DONWORTH,
Judge.

[Endorsed.]

[Title of Court and Cause.]

Assignment of Errors.

Comes now the defendant, Northern Pacific Railway Company, and files the following assignment of errors upon which it will rely upon its prosecu-

tion of its writ of error in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause.

I.

The Honorable Circuit Court erred in overruling the motion made by the defendant for a nonsuit at the close of plaintiff's case. To which ruling of the Court defendant excepted, which exception was allowed by the Court.

II.

The Court erred in overruling the motion of the defendant, at the close of all the evidence in the case, to instruct the jury to return a verdict in favor of the defendant, for the reason that the plaintiff was not entitled to recover judgment against the defendant under the evidence.

III.

That the Court erred in admitting incompetent and immaterial evidence over the objection of the defendant, which evidence was prejudicial to defendant and was introduced by the plaintiff for the purpose of proving that the plaintiff had the necessary money with which to pay his fare as a passenger on defendant's train, which evidence consisted of receipts for postoffice money orders for money sent by the plaintiff to his wife in Austria many months prior to the time of the accident, as shown by Plaintiff's Exhibits "D," "E" and "F," set forth in the following evidence:

Q. "How do you send money home when you send it? A. Through the postoffice.

Q. Have you the receipts for any money?

A. Yes.

Q. Where are they? A. In my pocket.

Q. Here? A. Yes, sir.

Mr. QUICK.—I would object to any offer of that as incompetent and immaterial.

The COURT.—Objection overruled; exception allowed.

Mr. GORDON.—I show you Plaintiff's Exhibits 'D,' 'E' and 'F,' did you ever see these before?

A. Yes.

Q. Where did you get them; did you ever have them? A. I got them at Carbonado.

Q. Did you pay money for these? A. Sure.

Q. Where were you sending the money represented by them? A. Home.

Q. To your wife?

A. To my partner; and he gave to my wife.

Mr. GORDON.—We make the offer of these Exhibits 'D,' 'E' and 'F' as evidence.

Mr. QUICK.—Objected to as immaterial.

The COURT.—Objection overruled; exception allowed.

Whereupon said receipts were received in evidence and marked as Plaintiff's Exhibits 'D,' 'E' and 'F,' respectively."

And in permitting plaintiff to testify over the objection of the defendant concerning receipts for post-office money orders which had been burned and which were for money sent to the old country many months prior to the date of the accident, as shown by the following evidence:

“Q. Did you lose any papers in a fire, and if so, when and where?

A. I lost some in a boarding-house in California.

Q. How long ago? A. Last year.

Q. What kind of papers?

Mr. QUICK.—We object to this.

The COURT.—Objection overruled; exception allowed.

A. Money order for postoffice papers, for the old country.

Mr. GORDON.—I want to show receipts for money forwarded by postoffice orders, of later dates than those already offered, were burned, with his naturalization papers.

Mr. QUICK.—We object as immaterial and incompetent.

The COURT.—Objection overruled; exception allowed.

A. They were postoffice money orders.”

Wherefore, defendant, plaintiff in error, prays that the judgment of the Honorable Circuit Court of the United States for the Western District of Washington, Western Division, rendered in the above-entitled cause, be reversed, and that such directions be given that full force and efficiency may inure to defendant by reason of its defense to said cause.

GEO. T. REID,

J. W. QUICK,

L. B. Da PONTE,

Attorneys for Defendant.

[Endorsed.]

[Endorsed]: No. 1934. United States Circuit Court of Appeals for the Ninth Circuit. The Northern Pacific Railway Company (a Corporation), Plaintiff in Error, vs. John Marinovich, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Western Division. Filed January 3, 1911.

F. D. MONCKTON,
Clerk.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY
COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN MARINOVICH,
Defendant in Error.

No. 1934

IN ERROR TO THE UNITED STATES CIRCUIT
COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, WESTERN
DIVISION.

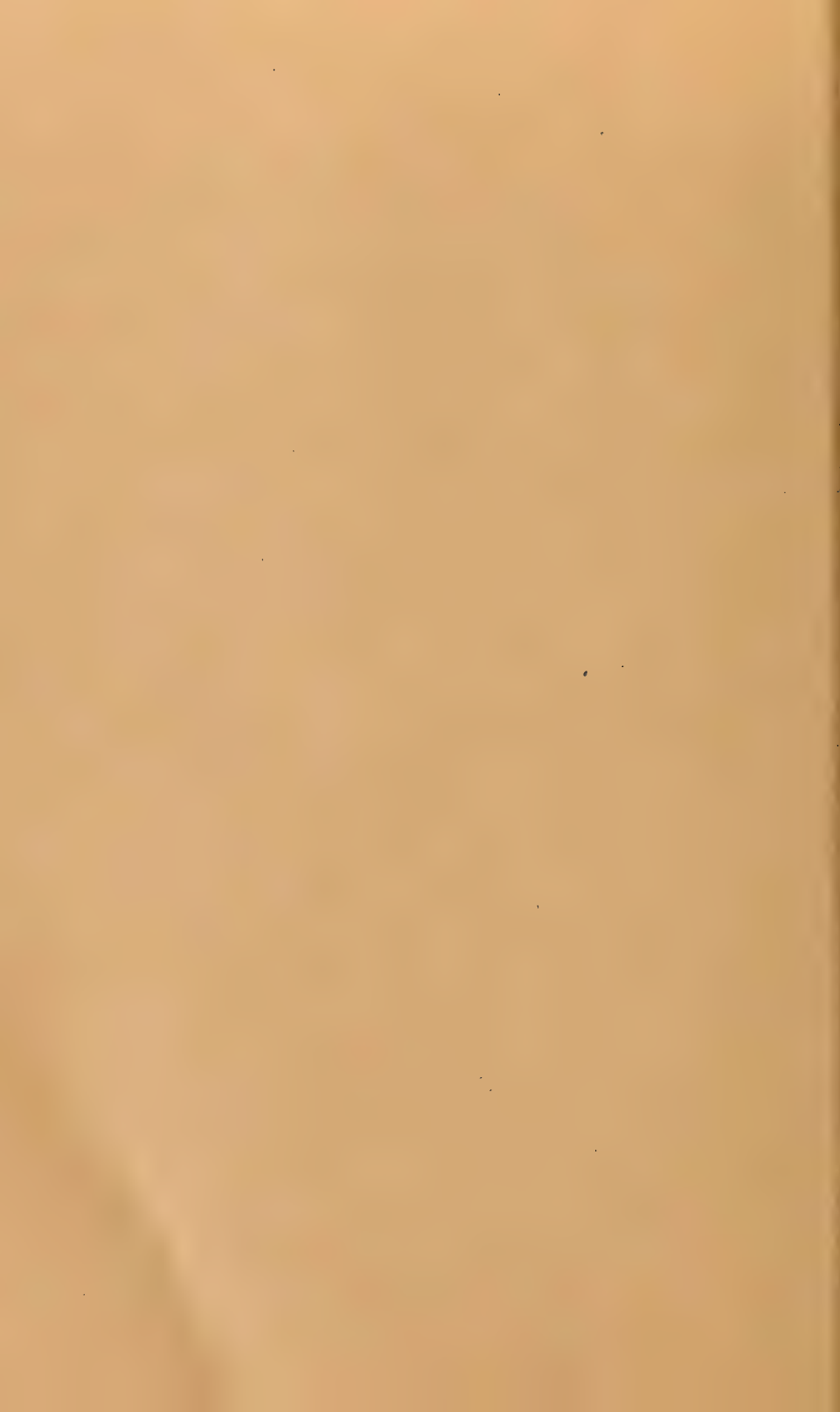
Brief of Plaintiff in Error

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Plaintiff in Error.

N. P. Headquarters Building, Tacoma, Wash.

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FILED



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Defendant in Error.

No. 1934

IN ERROR TO THE UNITED STATES CIRCUIT
COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, WESTERN
DIVISION.

Brief of Plaintiff in Error

STATEMENT.

This was an action brought by the defendant in error (hereinafter called plaintiff) against the plaintiff in error (hereinafter called defendant) to recover damages for injuries received on the 12th day of May, 1910. while in the waiting room of the station house at Mc-

Millin, on a branch line of defendant's railroad, commonly called the "Buckley Branch."

The plaintiff was born in Austria and came to the United States in 1894 and has lived in the State of Washington most of the time since 1896, and for the past eight or nine years has worked as a "coke heaver" at the town of Wilkeson and other mining towns in that locality. In May, 1910, he was working at Fairfax, a short distance from Wilkeson, and left Fairfax and came to Wilkeson, where he worked one day, and on the morning of the 12th left Wilkeson at about "twenty minutes to seven" and went by train to South Prairie. Leaving the train here, he went to Joe Lee's sawmill and inquired for Lee, and, on being informed that Lee was "at the logging camp," he walked to McMillin, passing the railroad stations of Crocker and Orting, walking part of the time on the railway track and part on the wagon road. He arrived at McMillin about noon. He testified on direct examination:

"On the morning of the 12th of May I left Wilkeson and went on the train to South Prairie, and from there I walked down to McMillin so I could see the country, as I was looking for a piece of land. I got to McMillin about noon and went inside the depot there to wait for a train to South Prairie. It was the first time I had ever been there and I did not know about the trains going through there. I wanted to take the first train to South Prairie to see Joe Lee." (Record, p. 21.)

While plaintiff claimed he was looking for land, it was shown that he made no inquiry of anyone about land, his testimony on cross-examination being as follows:

“Q. How long did you stay at South Prairie?

A. About two minutes.

Q. Then where did you go?

A. To Joe Lee's sawmill, and Broomfield, and asked a couple of men loading a car, if Joe Lee at home, and they said 'No,' he was at the logging camp; and I go to Crocker and to Orting and McMillin.

Q. Did you walk all the way?

A. Yes.

Q. On the railroad track?

A. Yes, and on the wagon road, too.

* * * *

Q. About what time did you get to McMillin?

A. Before noon.

Q. What did you go to McMillin for?

A. Looking to buy a piece of land.

Q. Had anybody told you of a piece of land there at McMillin?

A. I came to look out what kind of land to buy.

Q. Did you talk to anybody about land on your way down?

A. No; no, just one man; he said that nobody was at home.

Q. Did you talk to anybody at Orting?

A. No.

Q. Did you talk to anybody at Crocker?

A. I never saw anybody there, only the section man.

Q. Did you talk to anybody at McMillin?

A. Nobody there, only one store.

Q. Did you go to the store?

A. Yes, and bought lunch, too.

Q. Who did you see there?

A. One girl.

Q. That is the girl in the store you bought the lunch from?

A. Yes.

Q. Did you ask her anything about the trains?

A. I asked her what time the train, and sometimes it comes along and sometimes not. She said it comes along sometimes.

Q. That was all she said?

A. Yes, sir.

Q. She did not tell you when it would come?

A. No; did not say at all what time it come.”
(Record, pp. 22 to 24.)

He also testified that he did not talk with any other person at McMillin; that he took the lunch which he bought at the store and went down to the railroad track, and after eating his lunch went into the waiting room and sat down to wait for a train. He had been there but five or ten minutes when a freight train, in which there were five cars next to the engine loaded with logs, came by, and when the first car was opposite the station a log fell from the car. The forward end of the log struck the ground, and the other end, remaining on the car, pushed the logs off this and the following cars and some of the logs struck the station building, demolishing it and severely injuring the plaintiff, who was in the station.

The station building and the conditions existing at McMillin are set forth in the evidence of Mr. Henry Ball, a merchant at McMillin, who was called by the plaintiff and testified as follows:

“I live at McMillin and am a merchant, having a store at that place. The little station house or waiting room that was knocked down and demolished last May was put in some time last spring; I think in February or March. It was what is commonly known as a blind station. There was a little place on one end for freight and on the other end was a small place, an open shed, with a bench around it for the convenience of people. There are a good many of them throughout the country. I circulated a petition to the railroad company to have them provide this waiting room and I think it was put in in February or March. It was about eight or ten feet from the track and had the name of the station lettered on each end of it.

Cross-examination by Mr. Quick:

“This building was located on the right of way and was about such an affair as you see along the tracks of the street railway. Before it was built the people had no place to get in out of the rain, and for that reason I petitioned the railroad company to construct it. McMillin is a small place with only two stores. People come to the stores and then cross over the track to this building, and before it was put up the women had to stand in the rain, and our idea was to have a place to step in out of the rain when waiting for the train. There was never any agent there and the Hale store had the agency for selling tickets and has had for 22 years to my knowledge. Tickets are sold at the Hale store and the store is always open from about a quarter to 7 in the morning until about half-past 7 in the evening, which is after the evening train. There were two passenger trains each way; one goes down in the morning and is due there about 8, and one goes up at about a

quarter to 10, and then in the evening there is a train comes up, leaving Tacoma about 5, and due at McMillin at 5:36, and another comes down from Buckley, which is due there about half-past 6 or a quarter to 7; I don't remember the exact schedule. There was no passenger train through there after 10 o'clock in the morning until 5:30 in the evening.

Re-direct examination by Mr. Gordon:

"During the twenty-four hours there were four passenger trains, two each way, on this line, and perhaps three local freights and occasionally a through freight; of course, they are not a regular thing. As to the freight trains, I cannot say, as I am not well posted. They sometimes run extras or something of that kind, but there were only four passenger trains, two each way. This logging train was going through at the time of the accident and was not a train scheduled to stop at McMillin. It is not a fact that passengers frequently, with or without a permit, board the freight trains at McMillin, to my knowledge." (Record, pp. 17 to 19.)

The Hale store, where Mrs. Hale acts as agent for the railway company and sells tickets and where the business of the company is transacted, is only about 110 feet from this station building. (Record, p. 14.)

The accident which caused plaintiff's injury occurred about 12:45 p. m., and the train was known as the "logging train" and was not scheduled to stop at McMillin. The five cars of logs had been picked up at the "Crocker Spur," where the logs had been loaded on the cars by the Morris & Brew Logging Company, and the cars were carefully inspected by the train crew before they were placed in the train, and the logs appeared to be loaded in a safe and proper manner. It was also shown that a

log will sometimes work loose and roll from its place on the car as a result of the constant jolting of the train.

The first train on which the plaintiff could take passage for the purpose of returning to South Prairie would not reach McMillin until 5:30 or 5:35 p. m., or about four hours and forty-five minutes after the time of the accident.

For the purpose of proving that the plaintiff had money sufficient to pay his fare on the train, and as a circumstance to be taken into consideration by the court and jury, tending to prove the relation of carrier and passenger, the plaintiff introduced in evidence, over the objection and exception of defendant, Exhibits "D," "E" and "F," which were postoffice receipts for international money orders for the sum of \$100.00 each and issued at the United States postoffice at Tacoma, Washington, February 18, 1907, for \$100.00 each, which money the plaintiff claimed he sent to his partner in Austria to be given to plaintiff's wife. (Record, p. 29.)

Mr. Ohls, a witness for the defendant, a German by birth and who speaks both the German and Austrian languages, testified that he saw the plaintiff at McMillin, and that "the plaintiff inquired about the camps, logging camps, and also about coal camps and said he was pretty tired. He was talking about Crocker and Bloomfield's; then he wanted to know about the St. Paul camps; they are big logging camps. I did not ask him if he was going out to them and he did not say; only said he was tired. When he left me he went over to Harry Ball's

store. I saw him afterwards, sitting in the waiting room. He was sitting like this (indicating), leaning his head on his hand. That was probably fifteen, twenty or twenty-five minutes before the log train came.” (Record, pp. 43-44.)

After plaintiff was injured he was taken on the train to Puyallup, a distance of about three miles, and placed in a hospital. His clothing was examined by a nurse for the purpose of learning his identity, and also what effects he had on him. She testified that “Mr. Bear and I examined his clothing and I went through the pockets to see if we could find his name and what effects he had on him. I found a paper giving his name, some matches, a handkerchief or two, but no money.” (Record, p. 42.) The nurse also testified to a certain visit made by J. E. Newton, the defendant’s claim agent, who called on the plaintiff for the purpose of obtaining a statement from the plaintiff concerning the happening of the accident, and that the statement of the plaintiff was written down by the claim agent and in her presence carefully read over to the plaintiff and fully explained to him, and that the plaintiff stated that it was his intention to walk back to Orting and take the train at Orting and return to South Prairie. That this written statement, which she also signed as a witness, was identified by her and introduced in evidence. (Record, p. 41.) The manner of taking this statement was fully explained by the claim agent. (Record, pp. 39-40.)

At the close of the evidence, the defendant challenged the sufficiency of the evidence and moved the court to

instruct the jury to return a verdict in its favor for the reason that the evidence was insufficient to entitle the plaintiff to recover, and for the further reason that the evidence affirmatively proved that the plaintiff was not a passenger at the time of his injury. This motion of the defendant was denied by the court and the defendant given an exception to the court's ruling.

ASSIGNMENT OF ERRORS.

I.

The Honorable Circuit Court erred in overruling the motion made by the defendant for a non-suit at the close of plaintiff's case, to which ruling of the court defendant excepted, which exception was allowed by the court.

II.

The Court erred in overruling the motion of the defendant, at the close of all the evidence in the case, to instruct the jury to return a verdict in favor of the defendant for the reason that the plaintiff was not entitled to recover judgment against the defendant under the evidence.

III.

That the Court erred in admitting incompetent and immaterial evidence over the objection of the defendant, which evidence was prejudicial to defendant and was introduced by the plaintiff for the purpose of proving that the plaintiff had the necessary money with which to pay his fare as a passenger on defendant's train, which evi-

dence consisted of receipts for postoffice money orders for money sent by the plaintiff to his wife in Austria many months prior to the time of the accident, as shown by Plaintiff's Exhibits "D," "E" and "F," set forth in the following evidence:

"Q. How do you send money home when you send it?

A. Through the postoffice.

Q. Have you the receipts for any money?

A. Yes.

Q. Where are they?

A. In my pocket.

Q. Here?

A. Yes, sir.

MR. QUICK: I would object to any offer of that as incompetent and immaterial.

THE COURT: Objection overruled; exception allowed.

MR. GORDON: I show you Plaintiff's Exhibits 'D,' 'E' and 'F'; did you ever see these before?

A. Yes.

Q. Where did you get them; did you ever have them?

A. I got them at Carbonado.

Q. Did you pay money for these?

A. Sure.

Q. Where were you sending the money represented by them?

A. Home.

Q. To your wife?

A. Yes; to my partner, and he gave to my wife.

MR. GORDON: We make the offer of these exhibits 'D,' 'E' and 'F' as evidence.

MR. QUICK: Objected to as immaterial.

THE COURT: Objection overruled; exception allowed.

Whereupon said receipts were received in evidence and marked as Plaintiff's Exhibits 'D,' 'E' and 'F,' respectively."

And in permitting plaintiff to testify over the objection of the defendant concerning receipts for postoffice money orders which had been burned and which were for money sent to the old country many months prior to the date of the accident, as shown by the following evidence:

"Q. Did you lose any papers in a fire, and, if so, when and where?

A. I lost some in a boarding house in California.

Q. How long ago?

A. Last year.

Q. What kind of papers?

MR. QUICK: We object to this.

THE COURT: Objection overruled; exception allowed.

A. Money order for postoffice papers, for the old country.

MR. GORDON: I want to show receipts for money forwarded by postoffice orders, of later dates than those already offered, were burned, with his naturalization papers.

MR. QUICK: We object as immaterial and incompetent.

THE COURT: Objection overruled; exception allowed.

A. They were postoffice money orders."

ARGUMENT.

There are but two questions presented by this appeal:

First: Did the Honorable Circuit Court err in overruling the defendant's motion for a directed verdict and in submitting the case to the jury?

Second: Did the Court err in admitting certain evidence set forth in the assignment of errors?

WAS THE PLAINTIFF A PASSENGER?

This action was brought on the theory that the plaintiff was a passenger at the time of his injury. It was tried upon this theory and on this same theory the case was submitted to the jury. The Honorable Circuit Court instructed the jury, among other things, as follows:

"In order to constitute one a passenger, he must go to the place provided by the carrier—in this case the railroad company—for the reception of passengers, and in such a case he is entitled to the use of the station facilities for a reasonable time before the departure of the train on which he intends to take passage. During such reasonable time he is a passenger to all intents and purposes, and entitled to the rights of a passenger. One question, therefore, perhaps the next important question that you have to pass upon, is, was he there within a reasonable time; that is, was the time at which he was there a reasonable time for a *bona fide* intending passenger to be there before the departure of the next train?"

* * * "What is a reasonable time is a question in this case of fact for you to determine." * * * "It is for you to say, under all those circumstances, whether

at the time of the occurrence it was a reasonable time for the plaintiff to be there intending to take passage upon the next train. If he was there more than a reasonable time before the departure of the next train, then he would not be entitled to the rights of a passenger and your verdict would be for the defendant.” (Record, pp. 52-3.)

While the law in respect to carrier and passenger was correctly stated to the jury, we insist that, as there was no dispute on the question of the length of time the plaintiff was at the station before the departure of a train on which he could take passage, it became a question for the determination of the Honorable Circuit Court whether under the admitted facts the relation of carrier and passenger existed. It was not disputed that the accident to plaintiff occurred at about 12:45 p. m.; that the first train on which he could take passage was not due to arrive at this station until 5:30 or 5:36 p. m. (Record, p. 18); that the railway company maintained no agent or other person at this station house, and that the business of the railway company and the sale of tickets was looked after at the Hale store, and had been for the past 22 years, which store was located about one hundred and ten feet from this little station building, or waiting room.

In the case of *Chicago & E. I. R. Co. vs. Jennings*, 60 N. E. 818, the court in the opinion, at the top of the second column on page 820, said:

“What facts will create the contract relation of carrier and passenger is a question of law, and, when the existence of such relation is in controversy, it is the

duty of the court to give a proper instruction, presented by a party, informing the jury what facts will be sufficient evidence of the contract.”

If there had been a controversy; if there had been evidence disputing the time when the plaintiff went into the waiting room, or the time when the next train would arrive, so that the Court could not say as a matter of law that the length of time was too great to create the relation of passenger and carrier, then the submission of the case to the jury under the instructions given would have been proper. But it was the duty of the Court in the first instance to determine the sufficiency of the evidence.

“The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court.”

Earnshaw vs. United States, 146 U. S. 60, 13 Sup. Ct. Rep. 14.

THE RELATION OF CARRIER AND PASSENGER IS CONTRACTUAL.

The rule is stated in 6 Cyc. 538, as follows:

“To give rise to the relation of passenger and carrier there must be not only an intent on the part of the former to avail himself of the facilities of the latter for transportation, but also an express or implied acceptance by the latter of the former as a passenger until there is an acceptance — that is, until within the express or implied knowledge of the carrier or his employes the person seeking to become a passenger has indicated his intention to become a passenger, which intention has been in some way acquiesced in, at least to the extent of not refusing transportation—the relation does not arise, even though the purpose of the person attempting to become a passenger is to pay fare when required.”

This rule is stated in *Chicago R. I. & P. Ry. Co. vs. Thurlow*, 178 Fed. 894, on pp. 897-8, as follows:

“It is well settled by repeated decisions that a person must be expressly or impliedly received as a passenger before a carrier becomes under obligation to exercise towards such person that high degree of care and caution for his safety which is due from a carrier to a passenger. The relation between carrier and passenger is contractual, and is created only by a contract express or implied. * * *

“Although it is not alleged in the petition that the deceased was a passenger, yet the case was tried by the plaintiff on theory that he was a passenger, and that at the time of the accident the relation of carrier and passenger had not been terminated. Assuming, for the purpose of the case, that the relation of passenger and carrier did exist by virtue of the contract entered into between the deceased and the defendant for his transportation from Wellington to Calhan, and that the defendant had undertaken, as to him, all the duties and obligations of a carrier of passengers, manifestly that relation terminated upon his arrival with his car at his destination and after a reasonable time had elapsed for him to alight and leave the premises of the defendant.” Citing cases.

There is no claim in this case that there was an express contract of carriage, and the sole question for consideration is whether the conceded facts create the contractual relation of carrier and passenger by implication. It is claimed by the plaintiff that, as he had never been to McMillin before and did not know when the next train would arrive on which he could leave, he had the right to stay on the premises of the defendant and in this little waiting room until such time as a train would come along on which he could depart, and that during all that time he would be a passenger, placing upon the

defendant all the duties and obligations imposed by law and growing out of the relation of carrier and passenger. It must be borne in mind that McMillin is and always has been what might be termed a cross-road station. Under the evidence there are only two stores there, and for over 20 years no station building or waiting room of any character; that some two or three months before the accident to the plaintiff the railway company erected this little shed at the request of persons signing a petition, which was circulated by the witness Ball, that those waiting for the trains might be sheltered from the rain. For over 20 years the agency for selling tickets and transacting such little business as the company had at that point was at the Hale store, about one hundred and ten feet distant from where this shed was erected. The only inquiry made by plaintiff was made of the girl in Mr. Ball's store, from whom he purchased a lunch, and it is quite evident from plaintiff's testimony that the girl did not understand his question or he did not understand her answer, or that she purposely answered him in a joking and evasive manner.

“Q. Did you ask her anything about the trains?

A. I asked her what time the train, and sometimes it comes along and sometimes not. She said it comes along sometimes.

Q. Was that all she said?

A. Yes, sir.

Q. Did she tell you when the train would come?

A. No; she did not say at all what time it come?

Q. She just said it would come along some time?

A. Yes." (Record, p. 24.)

That the statements of persons not connected with the railway company are not binding upon the company and do not justify one in acting thereon is clearly stated in the case of *Haase vs. Ore. Ry. & Nav. Co.* (Ore.), 24 Pac. 238, in the following from the opinion at page 240:

"The first question to which our attention will be directed is the appellant's exception to that part of the plaintiff's evidence in relation to what was told him at the Umatilla House, and what the unknown man said to him in relation to the movements of the defendant's trains, etc. The purpose of this evidence is not very apparent; but by it, I think, the plaintiff sought to place before the jury the information upon which he acted in relation to the defendant's trains, and to account for his going to the yard where he was hurt at the late hour of the night when the accident occurred. It is difficult to see how the unauthorized acts or words of a stranger, who is not shown to have any connection with the defendant company, could affect or bind it, and yet it is perfectly obvious from the whole tenor of this evidence that such was its purpose."

It was the duty of the plaintiff to inform himself of the time when he could depart from McMillin on one of defendant's trains.

"It is the duty of a person about to take passage on a railroad train to inform himself when, where and how he can go or stop, according to the regulations of the railroad company."

Atchison, T. & S. F. Co. vs. Gants, 17 Pac. 54.

"Doubtless a railroad company not only has the right, but it is its duty, to operate its trains in accordance with established rules and regulations, and upon these it is

not bound to infringe in order to accommodate a single passenger. On the other hand, it is the duty of one about to become a passenger to use reasonable diligence in acquainting himself with the rules and regulations of the company respecting the time when, the place where and the circumstances under which a train upon which he desires to travel may go or stop, according to the company's rules or regulations; and if by neglecting to do so he makes a mistake, he can have no remedy if he be carried past his destination or ejected before getting there."

Pittsburg, C. & S. St. Co. vs. Lightcap, 34 N. E. 243. (Opinion, p. 244.)

"There can be no pretense that plaintiff was induced to go upon the mixed train, which did not run to his place of destination, by reason of any invitation or representation made by any servant of the company, and we understand it to be the duty of a person, situated as was plaintiff, to inform himself whether or not he could make that continuous passage from Temple to Ballinger contemplated by his ticket, on any particular train, and the jury should have been so instructed."

Gulf C. & S. F. Ry. Co. vs. Henry, 19 S. W. 870. (Opinion, p. 872.)

The plaintiff could have informed himself concerning the train had he gone to Hale's store, or had he made any effort to inform himself, as he should have done, when it must have been evident to him that he did not understand the girl at Ball's store or that she had not fully informed him concerning the train. The plaintiff testified that he could not read or write (Record, p. 34), so time tables, schedule cards or other printed information was of no assistance to him.

The fact that one cannot read or easily understand

our language is no justification in attempting to take up his abode on the premises of another, and this fact, I anticipate, would be most forcibly impressed upon us if traveling in a foreign country where we were unable to read or understand the language and unable to inform ourselves of the time of the departure of some train or stage on which we desired to take passage, and which would not leave for two or three days, if we should go into the public waiting room and roll up in our blankets to await transportation. The fact that plaintiff did not know or even was unable to learn when his train would arrive in no manner changed his status or tended to constitute him a passenger.

The defendant had a right — in fact, it was its duty — to establish schedules for the running of its trains; and this it did when it provided for two passenger trains each way daily on this branch line, one due at McMillin about 8 and the other about 9:45 a. m., and one “leaving Tacoma about 5 and due at McMillin at 5:36, and another comes down from Buckley, which is due there about half-past 6 or quarter to 7” p. m., and provided for the sale of tickets at the Hale store, which was open before the morning train and kept open until after the evening trains. (Record, p. 18.) The defendant had thus performed its full duty, and had a right to use its tracks and property with the understanding and presumption that passengers would be upon its premises for the purpose of taking passage upon its trains only within a reasonable time before the arrival of such trains at its station. At the time the logging train went by this station

it was at least four hours and forty-five minutes before the arrival of a passenger train or any train on which the plaintiff could take passage. The defendant, therefore, had a right to presume that its track was free and clear of intending passengers, or persons, to whom it would owe any duty in that respect, and the fact that the plaintiff was in this little waiting room gave him no greater rights than if he had been injured in the same manner while he was walking along the track between the stations of Orting and McMillin only a few minutes before.

In the case of *Matson vs. Port Townsend Southern R. Co.*, 9 Wash. 449, the plaintiff was fishing in a creek near the railroad bridge when a train loaded with logs came by and one of the logs rolled from the train, striking and injuring the plaintiff; and the court in considering the case held that "if the proof showed that the logs were loaded in the manner required by the custom prevailing among those engaged in the transportation of logs on cars propelled by steam power, the presumption of negligence, if any existed, would be overcome," and that as the railway company had no reason to anticipate the presence of the plaintiff on its premises at that time and place, and his presence was not known to any of its agents or employees, it owed him no duty, and that defendant's motion for judgment should be granted.

It was proven in the case at bar that the logs were loaded in the customary way, the cars were inspected by the train crew, the track at the place of the accident was straight and in good condition, and also that logs prop-

erly loaded will sometimes work loose and fall from moving cars. (Record, pp. 45-50.)

We desire to call the attention of the Court especially to the case of *Fremont, E. & M. V. R. Co. vs. Hagblad*, 101 N. W. 1033, as this case is very instructive on the question of when the relation of carrier and passenger begins and the duty which a carrier owes to persons along its tracks or resorting to its station. A great many decisions are cited and reviewed in the opinion; after which the court, beginning on page 1038, says:

“A railroad company is not bound to furnish a place of entertainment for persons who may intend at some future time to become passengers over its road; and such a person who resorts to its station, or who stands upon its platform exposing himself to such dangers and risks as may naturally and obviously occur at such a place by reason of rapidly moving trains, switching of freight cars or engines passing by, or by the moving of articles of freight, assumes and takes upon himself the risk of injury, and is entitled to the carrier’s protection in no greater degree than any other licensee. Ordinary care under all the circumstances of the time and place is all he is entitled to. The fact that he may have procured a ticket is immaterial.

The relation of carrier and passenger does not begin until within a reasonable time prior to the time fixed for the departure of the train the prospective passenger intends to take, and not until he has in some manner, either expressly or impliedly, placed himself within the carrier’s charge. If, within a reasonable time before the departure of the train he intends to take, he goes to the place provided for the reception of intending passengers, and there places himself actually or impliedly within the carrier’s care, then, and not until then, the law places around him the protection vouchsafed to passengers, and charges the carrier with the highest de-

gree of care for his safety. To hold otherwise would be to place a most unjust and onerous burden upon the carrier. In this day and age of 'limited trains,' 'lightning expresses,' 'flyers,' 'cannon balls,' as they are sometimes fancifully designated, many stations and platforms upon main lines of railroad are passed by such trains at rates of speed as high as 60 miles an hour. If a railroad company were held to the same high degree of care to persons who are not passengers over its road, resorting to its stations to loaf or loiter, it would be compelled to moderate the rate of speed of such trains at every way station along its line, and otherwise would be compelled to interfere with the operation of its trains, and the proper conduct of its business, to preserve the safety and welfare of persons to whom it owed no duty. Such a rule would be intolerable, and has not been enacted by the section under consideration. In order to state a cause of action upon the statutory duty of a railroad company to a passenger, it is necessary that the facts stated show that the person suing is one of a class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger, in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law, and is not sufficient. This rule has been well stated in the case of *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337, where the plaintiff sued in trespass for removal from a railroad station house, and in his replication attempted to establish his right to be and remain at the station. The court sustained a demurrer to the replication, and entered judgment for the defendant. In the syllabus the court says: 'The right to enter and remain at a railroad station house extends only as far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars, and, as to what is a reasonable time, will depend upon the circumstances of each particular case.' And in the opinion it is said: 'It is not alleged that it was the intent of the plaintiff to go upon the then next regular train, or that his ticket was for such train. For aught that is alleged, his ticket may have been for, and his

intent to go upon, one of those trains called "excursion trains," that are advertised to run at some particular time, and for which tickets are sold many days in advance of the time of departure. In this respect we think the replication is defective. The plaintiff should have alleged that at the time he was at the station awaiting the departure of a train that was expected soon to leave and on which he intended to go. The replication should show that the plaintiff was there intending to go upon a train that was expected to leave within such a short period of time thereafter that, in view of the rule as before laid down, he would have the right to remain at the station until its departure. This replication, we think, does not show such a state of facts as are necessary to vest such right in the plaintiff, and therefore it is insufficient.' So far, then, from having brought himself within the class of 'a passenger being transported,' as the statute prescribes, plaintiff in this case has not even pleaded facts sufficient to show that he was a passenger under the non-statute law prescribing the qualifications of the class of persons embraced under that general designation."

As well stated, if a railway company were held to its responsibilities as a carrier to persons who resort to its stations at other than a reasonable time prior to the expected departure of a train on which they could take passage, "*it would be compelled to moderate the rate of speed of such trains at every way station along its line.*" It would be impossible to operate *limited trains* and such obligations would greatly hamper carriers in the conduct of their business and impose unreasonable restrictions.

The fact that logs sometimes work loose and fall from moving cars certainly emphasizes the reason for the rule that carriers are not required to anticipate the presence

of passengers, *especially at way stations*, hours in advance of the arrival of scheduled passenger trains.

In the case of *Illinois Cent. R. Co. vs. Laloge*, 69 S. W. 795, the plaintiff arrived at Central City, Kentucky, on the morning of February 16, 1900, and her husband arrived later in the day. They did not stop at any hotel or other place, but loitered about the depot and other points in the town during the day. About 8 o'clock in the evening they went to the depot for the purpose of waiting for the train upon which they were to take passage, which train was not due until about 1:05 a. m. After learning the time their train would arrive, they went out in the town and returned again about 10 o'clock to the depot, when the plaintiff was assaulted. The court in the opinion said, at page 796:

“The carrier is not an innkeeper. It cannot, in the discharge of its other duties required by the law, be held to furnish accommodation for the entertainment, for an indefinite length of time, of those who contemplate in the future becoming its passengers. It would have been just as reasonable to have held appellant liable for the safety and comfort of appellee at any time while at its depot, from 9 o'clock in the morning of the 16th to 12:30 in the morning of the 17th, as for the time sued for.”

It will be observed that the court here holds that three hours is an unreasonable length of time for an intending passenger to go to the station before the arrival of his train. True it is that in the State of Kentucky there is a statute requiring railway companies to keep their ticket offices open for the sale of tickets at least thirty minutes immediately preceding the scheduled time

of the departure of all passenger trains, and shall open the waiting room for passengers at the same time as the ticket office and keep it open and comfortably warmed in cold weather until the train departs, and that the court in this case refers to this statute as a legislative expression of what is a reasonable time. But even in the absence of such a statute we are free to assert that no court of last resort has ever held that four hours and forty-five minutes is a reasonable time for an intending passenger to go upon the premises of the carrier and thereby create by implication the relation of carrier and passenger.

In *Andrews vs. Yazoo & M. V. R. Co.*, 38 So. 773, the Supreme Court of Mississippi held that "where plaintiff, who intended to take a train not due for an hour or so, and who had purchased no ticket, obtained permission from the station agent to do some writing in the office of the station, and while there he and the agent became involved in an altercation over a private matter, in which the agent committed an assault on plaintiff, the railroad company was not liable, the relation of passenger and carrier not existing, and Code 1892, Sec. 4313, requiring railroad companies to furnish suitable reception rooms, and to protect passengers from offensive conduct, having no application."

In the case of *Archer vs. Union Pacific R. Co.*, 85 S. W. 934, the Supreme Court of Missouri held that the relation of passenger did not exist where the plaintiff was a member of an excursion party which had gone from Kansas City, Missouri, to Topeka, Kansas, to attend a meeting of a secret order and had arranged with the carrier to place their car on a side track near the station in order that the members of the party could re-

turn to the car at any time during the night they desired and remain in the car until its departure the following morning, and that the plaintiff was injured while going to the car between 4 and 5 o'clock in the morning, and some three hours before the car was to be picked up for the return trip.

“The duty of a railroad to have its station platforms guarded and lighted so as to protect persons coming to the station to bid farewell to friends intending to leave on regular passenger trains does not extend to persons coming at an unusual hour with one who intends leaving on a freight in charge of stock, and who, although allowed the use of the waiting room, and allowed to load at the platform instead of in the yards, is not a passenger except in a very limited sense.”

Dowd vs. Chicago, M. & St. P. Ry. Co., 54 N. W. 24.

In the case of *Chicago, K. & W. R. Co. v. Frazer*, 40 Pac. 923, a case where the plaintiff had neglected to leave the train within a reasonable time after it arrived at the station and he was injured by a construction train colliding with the car, the Supreme Court of Kansas said, at page 924:

“When he had been safely carried to his destination, and to a point which was then the end of the road, and had been afforded almost half an hour to leave the train, the company no longer owed him any duty as a passenger, nor was it under any obligation to him as such.”

“Plaintiff entered a railroad station, intending to take the last train, but, finding it had gone, waited there for a horse car. While he waited, the depot master put out some of the lights, preparatory to closing up, and plaintiff, on leaving, was injured through the darkness

on the steps. *Held*, that he was not a passenger, and the railroad company was not liable.”

Heinlein vs. Boston & P. R. Co., 16 N. E. 698.

The authorities are unanimous in holding that the relation of carrier and passenger is not created by implication where the person intending to become a passenger goes to the station an unreasonable length of time before the scheduled time for the departure of his train. And while what constitutes a reasonable time must depend upon the facts of each particular case, no court, so far as we have been able to find, has held four hours and forty-five minutes to be a reasonable time under any circumstances. The waiting room at a station is for the accommodation of passengers, and not a loafing place. The distance the plaintiff walked from South Prairie to McMillin was 11 miles. It is three miles from Orting to McMillin and eight miles from Orting to South Prairie.” (Record, p. 47.) The witness Ohls testified: “I saw him (plaintiff) afterwards sitting in the waiting room; he was sitting like this (indicating), leaning his head on his hand,” and that just before that the plaintiff in talking with this witness had said that he was tired. (Record, p. 44.) This evidence is corroborated by the conduct of the plaintiff in that when the freight train approached the station he did not leave the seat where he was sitting to go out and stop the train, or to see if it was one on which he could take passage. He was evidently tired from his long walk and had gone into this waiting room simply to rest, and for that reason paid no attention to the train.

Under these circumstances the Court should have held, as a matter of law, that the plaintiff was not a passenger; and it was error to submit this question to the jury when the evidence showing the length of time the plaintiff was in the waiting room before the time for the arrival of a train on which he could take passage was not disputed, and that such time was at least four hours and forty-five minutes.

THE COURT ERRED IN ADMITTING INCOMPETENT AND IMMATERIAL EVIDENCE.

If it should be held that this case was properly submitted to the jury, it then becomes necessary to consider the alleged error committed by the Court in admitting certain evidence set forth on pages 58, 59 and 60 of the record.

In order to sustain the claim of the plaintiff that he was a passenger, it became necessary to prove that he possessed the means of procuring transportation; and, as it was admitted that he had not purchased a ticket, it became necessary to prove that he was provided with money sufficient to procure transportation. It was shown that when he was taken to the hospital at Puyallup, immediately after the injury, a nurse in the hospital examined his clothing and "went through the pockets to see if we could find his name and what effects he had on him." That she found "some matches, a handkerchief or two, but no money." (Record, p. 42.) As tending to show that the plaintiff had money with which to secure transportation, he was permitted, over

the objection and exception of the defendant, to identify Exhibits "D," "E" and "F," which exhibits were admitted in evidence over the objection and exception of counsel for defendant. These exhibits introduced in evidence and placed before the jury are receipts for international money orders issued at the United States post-office at Tacoma, Washington, February 18, 1907, and are for the sum of \$100.00 each, and this money plaintiff testified he sent to his partner in the old country to be given to his wife. (Record, p. 29.) The plaintiff was afterward recalled to the witness stand and over the objection of the defendant permitted to testify that he had lost other postoffice money order receipts, which had been destroyed by fire in a boarding house in California. (Record, p. 34.) It will be observed that the plaintiff had already testified that he had not sent any money to his wife during the last year.

"Q. How much money did you send back home, if any, in the last year?

MR. QUICK: That is objected to as immaterial.

THE COURT: Objection overruled; exception allowed.

Q. How much?

A. No send any last year.

Q. What did you do with your money last year?

A. Spent it for myself; no work last year much; I was laid off; they shut down fifty or sixty ovens there." (Record, pp. 27-8.)

How it can be claimed that the fact that the plaintiff sent money to his wife in Austria in February, 1907, more than three years prior to the date of his injury,

tended to prove that the plaintiff had the necessary money with which to purchase transportation on May 12, 1910, is something we cannot comprehend; and yet it is just such evidence as this that many juries will seize upon as an excuse for returning a verdict against a corporation.

This evidence did not tend to prove any issue in the case. It did not prove that the plaintiff had money at the time he was injured. It did not disprove the statement of Miss LaPlante, the nurse, that there was no money in the pockets of his clothes when she examined them at the hospital. The fact that he had \$300.00 in February, 1907, did not tend to prove that he had a like sum, or any money at all, when he walked from South Prairie to McMillin and went into the little waiting room to sit down and rest. The only effect of such evidence was to poison the mind of the jury against the inference that the plaintiff was not intending to take passage upon the train at that point, which inference was properly deducible from the evidence that he had walked from South Prairie to McMillin; that he claimed to Mr. Ohls that he was looking for work, but refused work when offered employment as a farm hand (Record, p. 44); that he told the claim agent of the defendant, and the nurse, that he was going to walk back to Orting, and that when the freight train came he made no effort to see if it was a train on which he could take passage as a passenger; that during the preceding year fifty or sixty ovens had been shut down and there was not much work,

and he had spent all his money on himself, as he testified.

For the errors above set forth and presented in this brief, we insist that the judgment in favor of the plaintiff should be reversed, with direction to the Honorable Circuit Court to enter judgment in favor of the plaintiff in error.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY
COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN MARINOVICH,
Defendant in Error.

No. 1934

IN ERROR TO THE UNITED STATES CIRCUIT
COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, WESTERN
DIVISION.

Brief of Defendant in Error

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STATEMENT.

We desire to make some additions to the statement of the case as contained in the opening brief.

Defendant in error (hereinafter called plaintiff) lived at Wilkeson and worked as a coal heaver at that place at different times. He left Wilkeson on the morning of the 12th of May, 1910, buying a ticket to South Prairie.

(Record, page 21.) Wilkeson is distant about five miles from South Prairie. McMillin, the point where the accident occurred, is eleven miles west of South Prairie, and between South Prairie and McMillan is Orting Station, three miles from South Prairie and eight miles from McMillin. (Record, page 47.) Wilkeson is not on the same line of railway as are McMillin, Orting, and South Prairie, save that the branch line from Wilkeson comes into the other line at South Prairie. This seems to us important, because from his residence at Wilkeson, plaintiff might be presumed to have some knowledge of train schedules at that point, and it is to be remembered that trains going through that point do not run by or through McMillin, the point where he was hurt. Puyallup is a station west of McMillin. The freight train which caused his injury was west bound. After the accident plaintiff was brought on that train to Puyallup (Record, page 46), where he was placed in a hospital.

The plaintiff testified:

“In the month of May last I was working at Fairfax, ten miles from Wilkeson, for the Fairfax Company and the Tacoma Smelter. I was working as a coke heaver, forking coke into a box car. I have been doing this for eight or nine years. * * * I was earning \$3.50 a day before I got hurt. On the morning of the 12th of May I left Wilkeson and went on the train to South Prairie and from there I walked down to McMillan, so that I could see the country, *as I was looking for a piece of land*. I got to McMillan about noon and went inside the depot there to wait for a train to South Prairie. It was the first time I had ever been there and I did not know about the trains going through there. *I wanted to take the first train to South Prairie to see Mr. Joe Lee.* I

would buy a ticket or pay on the car, but there was no agent there. *I had money to pay my way.* I sat down about ten minutes inside the depot, then along came a train, run as fast as a passenger train, and logs fell off and smashed the depot and myself.” (Record, pp. 21-22.)

It appears that there are two little stores besides the station house at McMillin. Prior to getting hurt, plaintiff had bought a lunch at one of these stores. On cross-examination, he testified as follows:

“Q. Who did you see there?

A. One girl.

Q. That is the girl in the store you bought the lunch from?

A. Yes.

Q. Did you ask her anything about the trains?

A. I asked her what time the train, and sometimes it comes along and sometimes not. She said it comes along sometimes.

Q. That was all she said?

A. Yes, sir.

Q. She did not tell you when it would come?

A. No; did not say at all what time it come. * *

* *” Record (page 24).

During the course of the cross-examination the following incident occurred:

“MR. QUICK: Will Mr. Ohls please come forward? (Gentleman comes forward.)

Q. (To plaintiff) Did you see this man there at McMillin and talk to him?

A. I don't know now; that is a long time.

Q. Didn't you talk to him in the Austrian language?

A. No, sir.

Q. Didn't talk to him there?

A. No, sir.

Q. *Didn't you borrow ten cents from him to get lunch with?*

A. *No, sir. Had plenty of money in my pocket.*

Q. You didn't get ten cents from this gentleman to buy lunch with?

A. No, sir; if I did that, you may take my head off * * *.

Q. How many of the stores were you in at McMillin?

A. Two stores.

Q. *Were you in both of them?*

A. *No.*

Q. Just to one store where the girl was?

A. Yes.

Q. Did you ask to buy a railroad ticket of anybody?

A. No.

Q. You did not inquire about a railroad ticket?

A. Nobody at the depot.

Q. Did you ask for the agent?

A. No agent there.

Q. Did you ask this girl where you could find the agent?

A. There was no agent; the depot was over on the other side of the County Road. The sign was there on the station; nobody there * * * *.

Q. You just asked her when the train would come?

A. Yes, that is all." (Record, pp. 24-5-6.)

ARGUMENT.

The main question to be considered in this cause is whether the learned Judge erred in submitting the case to the jury.

It is conceded that plaintiff was in the station or waiting room of the defendant four hours and forty-five minutes before the time for the arrival of a train on which he could take passage. This much being conceded, it is the contention of learned counsel for the defendant that as a matter of law, the Court should have held the length of time unreasonable and instructed accordingly.

The learned counsel concedes that, within a reasonable time before the departure of the train upon which he intends to take passage, a person who goes to the place provided for the reception of intending passengers is entitled to all the protection which is vouchsafed to passengers. We have no quarrel with anything that is decided in the cases cited in defendant's brief. The difference in the facts and circumstances attending them is what differentiates those cases from the present one.

Earnshaw v. United States, cited at page 16 of counsel's brief, was brought for the recovery of duties upon imported iron. The question turned on the reasonableness of the notice of hearing given by the merchant appraiser, and the Court say:

“The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court.”

In *Chicago, R. I. & P. Ry. Co. vs. Thurlow*, cited on page 17 of their brief, the passenger had reached his destination, the journey was over, and the Court held that the relation of carrier and passenger was terminated.

In *Gulf C. & S. F. Ry. Co. vs. Henry*, cited on page 20 of their brief, plaintiff, of his own volition, had taken a mixed train which did not run to the station to which he was ticketed.

In *Matson vs. Port Townsend Southern R. R. Co.*, the Washington case cited on page 22 of their brief, plaintiff was injured while fishing along defendant's right-of-way. The rights of a passenger or intending passenger were not involved. The Court at page 453 say:

“It follows from what we have said that the plaintiff was a trespasser upon the right-of-way of appellant at the time he was injured.”

In *Illinois Cent. R. Co. vs. Laloge*, cited at page 26 of their brief, plaintiff went to the depot at 8 o'clock in the evening and was informed that a train would not be due until 1:05 in the morning. At 10 o'clock he was assaulted in the depot, and the Court held that he could not claim the rights of a passenger. It will be observed that here the circumstances enabled him to get the information as to his train at the depot and that he actually had secured it two hours before he was injured.

In *Andrews vs. Yazoo & M. V. R. Co.*, cited at page 27 of their brief, the plaintiff, while at the depot to take a train which he had been informed would not arrive for an hour or so, was injured in an altercation with the station agent, and it was held that he could not claim the rights of a passenger.

In *Archer vs. Union Pacific R. Co.*, cited on page 27, plaintiff was one of a party of excursionists occupying a car upon a siding. He was injured in going to the car the morning after its arrival. Held, that he could not claim the rights of a passenger.

It will be observed that, in their facts, none of the cases cited by counsel have anything in common with the present case.

Generally speaking, "The term 'reasonable time' is relative, and its meaning depends entirely upon the circumstances."

23 A. & E. Enc. of Law, 2nd Ed., page 971.

"What constitutes a reasonable time is a mixed question of law and fact depending on the particular circumstances."

Bishop on Non-Contract Law, Sec. 1161.

Louisville etc. Railroad v. Mahan, 8 Bush. 184.

Mote v. Chicago etc. R. Co., 27 Iowa 22.

The view which the learned Circuit Judge took of the question now under consideration is so clearly stated in his charge that we are constrained to cite it.

“It is not the policy of the law to require railroad companies to maintain their station facilities for the benefit of persons who at some future time expect to become passengers; there must be some limit as to the right of a person to use a station with the obligations, or rather with the rights, of a passenger. Now, the law does not fix that limit by any number of minutes or any number of hours or in any other way; it says a reasonable time. What is a reasonable time is a question in this case of fact for you to determine. It depends upon the circumstances of the case. The circumstances here are more or less contested. I will not undertake to state the circumstances pro and con. They have been argued by counsel and appear in the evidence. It is for you to say under all those circumstances whether at the time of the occurrence it was a reasonable time for the plaintiff to be there intending to take passage upon the next train.”

Counsel is right in the statement which they make at page 29 of their brief, viz.: “What constitutes a reasonable time must depend upon the facts of each particular case.” And, while it may be true, as they suggest, that no Court, probably, has held four hours and forty-five minutes to be a reasonable time under any circumstances, we, nevertheless, venture the opinion that no Court has held four hours and forty-five minutes to be an *unreasonable* time under circumstances such as are shown here.

An examination will disclose that in each and every case cited by them, where the rights of an intending passenger were involved, information as to the time of arrival of trains was available at the place where passage was to be taken, while in this case there was neither

agent, depot master, porter, or other servant representing the defendant. There was neither blackboard, timetable or other information to be had as to the time when the "next" or any train would be due thereat. And these are circumstances to be taken into consideration in determining whether any particular period of time would be reasonable or unreasonable. Especially so where, as in this case, the plaintiff had never been at that point or place before. He was a stranger and had absolutely no knowledge as to the schedule of trains stopping at that point.

Will counsel say that a railway company performs its whole duty to intending passengers when it makes absolutely no provision whatever at the station house or place where it expects them to take passage whereby such intending passengers can procure information as to train schedules? At page 19 of their brief it is said:

"It was the duty of the plaintiff to inform himself of the time when he could depart from McMillin on one of defendant's trains."

From whom and from what source would counsel have had the plaintiff inform himself as to the time when he could depart on defendant's train from McMillin to South Prairie? Is it unreasonable that a stranger at a railroad point, wholly unfamiliar with the schedule of trains departing from that point, should rely on being able to get the necessary information at that place or point which the company has marked out and appointed as the place

or point for taking passage? At page 24 of their brief, counsel say :

“The statements of persons not connected with the railroad company are not binding upon the company and *do not justify one in acting thereon.*”

And in support of that statement counsel cite the case of *Hasse vs. Oregon Ry. & Nav. Co.* (Ore.), 24 Pac. 238, where the Court say :

“It is difficult to see how the unauthorized acts or words of a stranger who is not shown to have any connection with the defendant company could affect or bind it.”

And, yet, the inexorable logic of counsel's position is that it was plaintiff's duty to have sought the information necessary to regulate his conduct from that very source which counsel and the Court condemn. He could not get information at the station house, or on the premises of the defendant, nor was there anybody, or anything, at that place to tell or to indicate to him that he could buy a ticket at Hale's store, *nor* is it contended nor does it appear *that there was a sign or anything else at the store to indicate that the railway company did business or had tickets for sale there.* Neither is it claimed, nor does it appear, that there was anything in or around the station directing intending passengers to go to the store to transact their business. Surely, counsel will not contend that their train schedule, like the time of the rising of the sun and the going down thereof, is a matter within the common knowledge of all mankind! What,

under the circumstances, could plaintiff do but sit down at the appointed place and wait for a train? The station was open, inviting him to enter. He did so, and within a few minutes was seriously injured — so seriously, indeed, that one can only marvel at the paucity of the verdict.

“It was on the right-hand side of the track, going toward Orting, and it was just a small frame building with one end closed and used as a warehouse for freight, and the other end was used as a waiting-room. This waiting-room had an opening on the side next to the track, like a place built for a door, but no door was put in, and there were three benches inside, which were used for seats. One of the benches was against the wall along the side and the other two against the end walls. This building was about eight or nine feet from the track, and on each end was painted the word ‘McMillin.’ The station building is located on the railway company’s right-of-way and about eight or nine feet back from the nearest rail.” (Test, G. W. Hale, Record, p. 13.)

The question we have been discussing argues itself. To state it is to argue it.

DID THE COURT ERR IN THE ADMISSION OF EVIDENCE?

We think Assignment No. III requires little consideration. In defendant’s affirmative answer it is alleged that “plaintiff was a trespasser upon either its freight train or upon its right-of-way and premises at McMillin, Washington, without right or authority, * * * and not for the purpose of transacting business with the defendant,” etc. (Record, page 7.)

The evidence which is the basis for the assignment was received upon the re-direct examination of the plaintiff. During his cross-examination of the plaintiff, learned counsel for the defendant asked a gentleman in the court room, Mr. Gus Ohls, to come forward and confront the witness, and, addressing the plaintiff, proceeded:

“Q. Did you see this man there at McMillin and talk to him?

“A. I don’t know now; that is a long time.

“Q. Didn’t you talk to him in the Austrian language?

“A. No, sir.

“Q. *Didn’t you borrow ten cents from him to get lunch with?*

“A. No, sir. Had plenty of money in my pocket.

“Q. You didn’t get ten cents from this gentleman to buy lunch with?

“A. No, sir; if I did that, you may take my head off.”

So that, by their answer, they seek to put the plaintiff in the position of a trespasser and a hobo, and by this incident of the cross-examination, as a beggar and a vag. It was under these circumstances that the Court, in its discretion, permitted the testimony, not “as a circumstance to be taken into consideration by the Court and jury *tending to prove the relation of carrier and passenger,*” as stated on page 9 of counsel’s brief. In view of the language of the answer and the somewhat unusual incident occurring on cross-examination as above related,

we submit it was within the discretion of the Court to permit this evidence as, in a sense, repelling the insinuation that he was a beggar. The learned trial judge who witnessed the somewhat dramatic incident surely committed no reversible error in this instance.

Counsel do not urge insufficiency of evidence to sustain the verdict other than as applied to Assignment No. I. Therefore, the references on pages 10 and 32 of their brief to the testimony of their claim agent and the nurse at the hospital, as we view it, have no relevancy to any error assigned; but, if we are mistaken in this, then we suggest that it is probable that the jury did not believe their testimony in the respects mentioned, as against the testimony of the plaintiff and other facts and circumstances appearing in the evidence. In any event, their verdict concludes the defendant, who has not moved against it for insufficiency. Without any objection from counsel, it was shown by the foremen, Tucker and Broomfield, of the Wilkeson Coal and Coke Company, for whom the plaintiff had worked, that he was a good workman and "his wages generally averaged about \$3.00 per day." (Record, page 31.) It was also shown by the testimony of another witness that the plaintiff had at least \$20.00 in money on the evening prior to the day in question. (Record, page 32.) And this was unobjected to.

It also appeared that he was rendered unconscious by the injury and remained so until after arriving at the hospital at Puyallup, whence he was taken on the freight

train which caused his injury. (Test. Dr. Bair, Record, page 15, and Test. Conductor Ronan, Record, page 46.) There was ample opportunity for him to lose his money in the confusion attending the accident or between the place of the accident and the hospital.

Gus Ohls, the party who was brought forward to confront the plaintiff while upon cross-examination, as hereinbefore mentioned, was called as a witness for the defense, and asked concerning his interview with the plaintiff on the day of the accident. On direct examination, he testified:

“I do not recollect about giving him any money; as to that, I would not say yes or no; there are so many going up and down the railroad I cannot swear to it. I think we were talking about money, but I don’t remember. *I don’t think I gave him money.*”

And on cross-examination:

“I saw him go to Ball’s store and he came out and went into this little waiting-room and had been there a few minutes when the train came along and the accident happened. *He talked with me something about the price of land was an acre and I told him and he said it was too high, too much money.*” (Record, page 44.)

We think the testimony of this witness is important in two respects. First, it does not sustain the imputation of counsel that the plaintiff sought to beg ten cents or any other sum from the witness. And, second, *because it does show* that the plaintiff was inquiring of the witness regarding the price of land, and this corroborates

the testimony of the plaintiff, who said that his walk from South Prairie to McMillin that day was for the purpose of looking at the country *with the view of buying land*.

On page 10 of their brief, counsel refer to the testimony of Mr. Newton, their claim agent, and Miss La Plante, the nurse, in regard to a written but unsigned statement prepared by the claim agent, to a portion of which, at least, these witnesses assert the plaintiff assented. It is claimed that on Saturday, the 21st of May, just nine days after receiving the injury, the nurse admitted the claim agent to the bedside of the plaintiff, and that in the course of his statement the plaintiff admitted that he intended to walk back to South Prairie. (Record, pages 40 and 41.) That he made such a statement plaintiff strenuously denied. (Record, pages 30-31-35.)

Among other injuries, plaintiff's tongue was badly cut and lacerated in the accident. On page 22 he says, "My tongue pretty near bit off." The same nurse, Miss La Plante, who corroborates the claim agent, admits on page 43 of the record that "for the first week plaintiff was in the hospital the doctors saw him every day and sometimes *twice a day*; he was in a *very critical condition*."

The plaintiff is a foreigner, has little understanding of English and talks it poorly and brokenly. (Record, page 42.) For a week after going into the hospital his condition was "very critical." And yet, nine days after

the injury it is claimed that he made the statement attributed to him by the nurse and the claim agent. The jury heard their testimony, heard his denial, were advised of the surrounding circumstances, and it is obvious from their verdict that they believed the plaintiff. In any event, the verdict has not been attacked for insufficiency of evidence in this particular, and it is difficult to perceive what legal bearing it can have upon this controversy.

Considering that defendant raises no question as to the sufficiency of the evidence save as going to the question of the reasonableness of the time between the happening of the injury and the arrival of the train on which he was to take passage; considering, further, that no question arises in respect to the charge of the Court; in the light of the verdict, it must be concluded that the case is sufficient in all other respects to establish defendant's liability.

In other words, an occurrence so unusual as that which caused this injury (Record, page 46) would be one from which the jury might infer *that want of care* and degree of caution which the law required of the defendant for the safety and protection of those entitled to claim rights as passengers.

It is respectfully submitted that the judgment should be affirmed.

GORDON & ASKREN,
DAVID & WESTCOTT, and
J. H. EASTERDAY,
Attorneys for Defendant in Error.

No. 1945

UNITED STATES CIRCUIT COURT OF APPEAL
FOR THE NINTH CIRCUIT.

THE ATCHISON, TOPEKA AND SANTA FE RAIL
WAY COMPANY (a Corporation),
Plaintiff in Error,

vs.

ALICE M. GILLILAND,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit
Court for the Southern District of California,
Southern Division.

FILED

MAR 3 - 1911

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

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Kerckhoff Building, Los Angeles, California,

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Kerckhoff Building, Los Angeles, California.

For Defendant in Error:

Messrs. W. O. MORTON, and

HARRY A. HOLLZER,

500 Germain Building, Los Angeles, California.

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit in and for the Southern District of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between the Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, and Alice M. Gilliland, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, the Atchison, Topeka and Santa Fe Railway Company, as by its

complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 20th day of January next, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 22d day of December, in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States the one hundred and thirty-fifth.

[Seal] WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of
America of the Ninth Judicial Circuit, in and
for the Southern District of California.

The above writ of error is hereby allowed.

OLIN WELLBORN,
Judge.

I hereby certify that a copy of the within writ of error was on the 22d day of December, 1910, lodged

in the clerk's office of the said United States Circuit Court for the Southern District of California, Southern Division for the said Defendant in Error.

[Seal]

WM. M. VAN DYKE,
Clerk U. S. Circuit Court, Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: No. 1527. R. United States Circuit Court of Appeals for the Ninth Circuit. Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, vs. Alice M. Gilliland, Defendant in Error. Writ of Error. Filed Dec. 22, 1910. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

[Citation (Original).]

UNITED STATES OF AMERICA,—ss.
To Alice M. Gilliland, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 20th day of January, A. D. 1911, pursuant to a writ of error on file in the Clerk's office of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Southern District of California, in that certain action Number 1527, wherein the Atchison, Topeka and Santa Fe Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said the

Atchison, Topeka and Santa Fe Railway Company, in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, and one of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit in and for the Southern District of California, this 22d day of December, A. D. 1910, and of the Independence of the United States, the one hundred and thirty-fifth.

OLIN WELLBORN,
U. S. District Judge, for the Southern District of
California.

Service of a copy of the within and foregoing citation is hereby admitted this 22d day of December, A. D. 1910.

W. O. MORTON and
HARRY A. HOLLZER,
Attorneys for Alice M. Gilliland.

[Endorsed]: Original. No. 1527. United States Circuit Court of Appeals for the Ninth Circuit. Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, vs. Alice M. Gilliland, Defendant in Error. Citation. Filed Dec. 23, 1910. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

[Answer of Judges to Writ of Error.]

The Answer of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division:

The record and all proceedings of the complaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Circuit Court to the United States Circuit Court of Appeals for the Ninth Circuit, in a certain schedule to this writ annexed. as within we are commanded.

By the Court.

[Seal]

WM. M. VAN DYKE,
Clerk.

In the United States Circuit Court for the Southern District of California, Southern Division.

No.———LAW.

ALICE M. GILLILAND,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
ROAD COMPANY (a Corporation),

Defendant.

Complaint.

To the Honorable, the Judges of said Court:

Plaintiff above named complains of the defendant above named, and for cause of action against said defendant alleges:

I.

That at all the times in this complaint mentioned, the defendant above named was and still is a corporation organized and existing under and by virtue of the laws of the State of Kansas, and doing business in the County of Los Angeles, State of California.

II.

That at all the times in this complaint mentioned, said defendant was and still is engaged in business as a common carrier in the transportation of passengers and baggage for hire in cars propelled by steam power over certain railway lines and tracks by it owned and controlled, extending from the State of Kansas to and through said County of Los Angeles, State of California; and at all the times in this complaint mentioned, said defendant has operated and still operates its cars and locomotives upon its said railway lines and tracks.

III.

That on or about the 7th day of July, 1909, at Kansas City in said State of Kansas, for and in consideration of a certain sum of money theretofore paid by said plaintiff to said defendant, the said defendant received said plaintiff into one of its passenger cars drawn by a steam locomotive engine for the purpose of conveying said plaintiff in said car and upon its said railroad, as a passenger, from said Kansas City to said State of California.

IV.

That at the time said plaintiff was being conveyed by said defendant as aforesaid, the said railway lines and tracks of defendant were so unskillfully

and imperfectly built and the same were, and were by said defendant suffered to be, in such a defective and dangerous condition that the said tracks were loose and were liable to shift and spread apart and sink at any time, upon very slight pressure being exerted upon or against said tracks, and the same were buried in water from two to four feet in depth, and it was highly dangerous and extremely unsafe for any train to be operated upon or along or over said tracks of defendant or any part thereof.

V.

That at all the times in this complaint mentioned, said defendant knew each and all of the matters and things hereinbefore set forth.

VI.

That on or about said 7th day of July, 1909, while said plaintiff was being conveyed by said defendant as aforesaid, the said defendant so negligently and carelessly managed and operated the locomotive drawing the car in which plaintiff was riding as aforesaid, and by reason of the dangerous and unsafe condition of said defendant's tracks and by reason of the carelessness and negligence of the defendant in building its said tracks and railway lines as aforesaid and in suffering the same to be in such a defective and dangerous condition as aforesaid, the said tracks of defendant at a place near the town of Pomona, in said State of Kansas, sank and shifted and spread apart and caused the said car in which plaintiff was riding as aforesaid to be derailed and thrown off from the tracks and upon its side and burying said car in water, and thereby and by reason

of said carelessness and negligence of defendant, said plaintiff was suddenly and with great force and violence thrown out of the seat in said car wherein plaintiff was riding as aforesaid, and by reason of the water which then and there rushed into said car, said plaintiff was drenched and covered with water above her hips and plaintiff was hemmed and held in said position, covered with water as aforesaid, for nearly a quarter of an hour. That thereupon, plaintiff was assisted in getting out of said car through a window thereof, and by reason of the fact that said car was surrounded on all sides by water nearly four feet in depth and that the said car was filled inside thereof with water to a depth of nearly four feet, said plaintiff was obliged to and did remain drenched and wet and exposed to the elements upon the top of the side of said car from about the hour of three o'clock P. M. of said 7th day of July, 1909, continuously until about nine o'clock P. M. of said day.

VII.

That by reason of the premises and said carelessness and negligence of said defendant, said plaintiff was then and there severely and painfully bruised and contused all over her body, and rendered sick, sore and disabled and sustained a severe and serious nervous shock, and ever since her said injuries sustained as aforesaid, plaintiff has been and still is unable to sleep and has suffered and still suffers and will continue to suffer for at least two years to come, great physical pain and mental anguish and has become a helpless, nervous wreck; that by reason of

her said injuries so sustained as aforesaid, said plaintiff was obliged to be and was attended by a special trained nurse for a period of more than five weeks and was obliged to remain and did remain in the hospital for a period of two weeks and was obliged to and did undergo a serious and painful surgical operation in a hospital in the City of Los Angeles, County of Los Angeles, State of California.

VIII.

That prior to and up to receiving her said injuries as aforesaid, said plaintiff was a strong woman, in good health and in the full possession of all her faculties and was engaged in the profession of teaching school and had been regularly earning as a teacher the sum of One Hundred and Twenty-five (\$125) Dollars per month, and ever since her said injuries, and by reason of said carelessness and negligence of said defendant, said plaintiff has been unable and will continue for at least another year to be unable, to follow her occupation as a teacher or earn any money by any other occupation. That prior to and up to the time of receiving her said injuries as aforesaid, said plaintiff was obliged to depend upon her earnings as such teacher for her support and maintenance, and her said occupation as a teacher was and still is her only means of earning a livelihood.

IX.

That by reason of the premises and of the carelessness and negligence of the defendant as aforesaid, said plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000) Dollars.

X.

That by reason of said injuries sustained by plaintiff through said carelessness and negligence of defendant as aforesaid, said plaintiff has been obliged to incur and has incurred a liability in the sum of Seven Hundred and Fifty (\$750) Dollars for medical attendance, nurse hire and hospital accommodations, and said plaintiff has thereby been further damaged in the additional sum of Seven Hundred and Fifty (\$750) Dollars.

Wherefore, plaintiff prays judgment against said defendant for the sum of Fifteen Thousand Seven Hundred and Fifty (\$15,750) Dollars, together with her costs of suit.

W. O. MORTON and
HARRY A. HOLLZER,
Attorneys for Plaintiff.

State of California,
County of Los Angeles,—ss.

Harry A. Hollzer, being duly sworn, says: That he is one of the attorneys for plaintiff in the foregoing entitled action; that he has read the foregoing complaint, on behalf of plaintiff, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true; that the said plaintiff is absent from the County of Los Angeles, State of California, and the facts are within the knowledge of this affiant, who is one of the attorneys for said plaintiff and therefore he makes this affidavit.

HARRY A. HOLLZER,

Subscribed and sworn to before me this 7th day of December, A. D. 1909.

[Seal]

O. E. SMITH,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original No. 1527. In the United States Circuit Court for the Southern District of California, Southern Division. No. ——. Law. Alice M. Gilliland, Plaintiff, vs. Atchison, Topeka and Santa Fe Railroad Company, a Corporation, Defendant. Complaint. Personal Injuries. ———— Received a copy of the within Complaint this ——— day of December, 1909. ————, Attorneys for Deft. Filed Dec. 7, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. W. O. Morton and Harry A. Hollzer, 500 Germain Building, Los Angeles, Cal.

[Summons.]

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
Southern District of California, Southern Division.*

ALICE M. GILLILAND,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
ROAD COMPANY (a Corporation),
Defendant.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Cir-

cuit Court, in the City of Los Angeles, County of Los Angeles.

The President of the United States of America,
Greeting: To the Atchison, Topeka and Santa
Fe Railroad Company, a Corporation:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said Court, in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover the sum of \$15,000.00 as damages for personal injuries alleged to have been sustained by reason of the carelessness and negligence of defendant. Plaintiff also prays judgment for \$500.00 for indebtedness incurred for medical attendance, nurse hire and hospital accommodations. Plaintiff also prays judgment for costs of suit; all of which more fully appears from the Complaint on file in this action to which you are hereby expressly referred, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the court for the relief demanded in the Complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this seventh day of December, in the year of our Lord one thou-

sand nine hundred and nine, and of our Independence the one hundred and thirty-fourth.

[Seal]

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I hereby certify, that I received the within writ on the 8th day of Dec., 1909, and personally served the same on the 8th day of Dec., 1909, by delivering to and leaving with A. T. & S. F. Ry., E. W. Camp, Designated Agent, said defendant named therein, personally, at the County of Los Angeles, in said District, a certified copy thereof, together with a copy of the Complaint, certified by Wm. M. Van Dyke attached thereto.

Los Angeles, Dec. 8, 1908.

LOS V. YOUNG WORTH,
U. S. Marshal.
By J. F. Durlin,
Deputy.

[Endorsed]: Original. Marshal's Doc. No. 1427. No. 1527. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Alice M. Gilliland vs. Atchison, Topeka & Santa Fe Railroad Company, a Corporation. Summons. W. O. Morton, Harry A. Hollzer, Plaintiff's Attorney. Filed Dec. 8, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

[Answer.]

*In the United States Circuit Court for the Southern
District of California, Southern Division.*

ALICE M. GILLILAND,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
ROAD COMPANY (a Corporation),

Defendant.

Comes now the defendant, The Atchison, Topeka and Santa Fe Railway Company, a Corporation, and answering the complaint of the plaintiff herein, shows to the Court:

I.

Upon information and belief denies the allegations contained in paragraph VII of said complaint that plaintiff was then and there, or at any time or place, severely or painfully or otherwise bruised, or contused all over her body, or in any part of her body, or rendered sick or sore or disabled; and denies that plaintiff sustained a severe or serious or any nervous shock; and denies that ever since any injuries sustained as aforesaid, or at all, as a consequence of the accident set forth in the complaint, plaintiff has been or is unable to sleep or has suffered or still suffers or will continue to suffer for at least two years to come, or for any period of time, great or other physical pain or mental anguish; and denies that plaintiff has become a helpless or other nervous wreck; and denies that by reason of the injuries al-

leged by her in her complaint to have been sustained, or any injuries sustained in any manner by reason of said accident, said plaintiff was obliged to be or was attended by any nurse for a period of more than five weeks, or any period, or was obliged to or did remain in any hospital for a period of two weeks or any period of time, or was obliged to or did undergo a serious or painful surgical operation in a hospital in the City of Los Angeles, County of Los Angeles, State of California, or in any hospital.

II.

Denies upon information and belief that prior to or up to receiving her said alleged injuries, plaintiff was a strong woman or in good health or in the full possession of all her faculties.

III.

The defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph VIII of said complaint that prior to and up to receiving her said injuries plaintiff was engaged in the profession of teaching school and had been regularly earning as a teacher the sum of \$125 per month; and basing its denial thereon denies the said allegations.

Defendant further denies, upon information and belief, that ever since her said alleged injuries or by reason of said carelessness or negligence of said defendant, or any carelessness or negligence of said defendant, said plaintiff has been unable, or will continue for at least another year, or any period of time, to be unable to follow her occupation as a teacher, or earn any money by any other occupation.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in said paragraph VIII of the complaint that prior to and up to the time of receiving her said injuries as aforesaid, the said plaintiff was obliged to depend upon her earnings as such teacher for her support and maintenance, and her said occupation as a teacher was and still is her only means of earning a livelihood; and basing its denial thereon it denies each and every of said allegations.

IV.

Denies that by reason of the premises, or of the carelessness or negligence of the defendant as alleged in said complaint, or of any negligence or carelessness of this defendant, the plaintiff has been damaged in the sum of \$15,000, or any sum whatever.

Defendant further denies that by reason of any injuries alleged in said complaint to have been sustained by plaintiff through the alleged carelessness or negligence of the defendant, or by reason of any negligence or carelessness of the defendant, the said plaintiff has been obliged to incur or has incurred a liability in the sum of \$500 or any sum for medical attendance or nurse hire or hospital accommodations, or has been further damaged in the additional sum of \$500, or any sum.

Wherefore defendant prays judgment that the plaintiff take nothing by her action, and that the defendant have its costs of said action.

E. W. CAMP,
U. T. CLOTFELTER,
M. W. REED, and
A. H. VAN COTT,
Attorneys for Defendant.

State of California,
County of Los Angeles,—ss.

A. G. Wells, being by me first duly sworn, says that he is an officer, namely, the General Manager of the defendant named in the foregoing Answer; that he has read said Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

A. G. WELLS.

Subscribed and sworn to before me this 28th day of December, A. D. 1909.

[Seal] J. L. B. HAMILTON,
Notary Public in and for Los Angeles County, California.

[Endorsed]: No. 1527. U. S. Circuit Court, Southern District of California, Southern Division. Alice M. Gilliland, Plaintiff, vs. A. T. & S. F. Ry., Defendant. Answer. Filed Dec. 30, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Received copy of the within Answer this 28th day of December, 1909. W. O. Morton & Harry A. Hollzer,

Attorneys for Plaintiff. E. W. Camp, U. T. Clotfelter, M. W. Reed, A. H. Van Cott, Attorneys for Defendant.

*In the United States Circuit Court for the Southern
District of California, Southern Division.*

No. 1527—LAW.

ALICE M. GILLILAND,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
ROAD COMPANY (a Corporation),
Defendant.

Amendment to Complaint.

To the Honorable, The Judges of the Above-entitled
Court:

Plaintiff above named, by leave of the Court first had and obtained, files this as an Amendment to her complaint on file herein, and for Amendment thereto substitutes the following in lieu of paragraph X, and the prayer of said Original Complaint, to wit:

X.

That by reason of said injuries sustained by plaintiff through said carelessness and negligence of said defendant as aforesaid, said plaintiff has been obliged to expend and has expended the sum of Seven Hundred and Fifty Dollars (\$750) for medical attendance, nurse hire and hospital care, and said plaintiff has thereby been further damaged in the additional sum of Seven Hundred and Fifty Dollars (\$750).

Wherefore, plaintiff prays judgment against said defendant for the sum of Fifteen Thousand Seven Hundred and Fifty Dollars (\$15,750), together with her costs of suit.

W. O. MORTON and
HARRY A. HOLLZER,
Attorneys for Plaintiff.

State of California,
County of Los Angeles,—ss.

Alice M. Gilliland, being duly sworn, says: That she is the plaintiff in the foregoing-entitled action; that she has read the foregoing Amendment to Complaint, and knows the contents thereof; that the same is true of her own knowledge, except as to those matters which are therein stated on her information or belief, and as to those matters, that she believes it to be true.

ALICE M. GILLILAND.

Subscribed and sworn to before me this 27th day of October, A. D. 1910.

HARRY A. HOLLZER,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. 1527. Law. In the United States Circuit Court for the Southern District of California, Southern Division. Alice M. Gilliland, Plaintiff, vs. Atchison, Topeka and Santa Fe Railroad Company, a Corp., Defendant. Amendment to Complaint. Filed Oct. 27, 1910. Wm. M. Van Dyke, Clerk. Chas. N. William, Deputy. Morton, Riddle & Hollzer, 500 Germain Building, Los Angeles, Cal., Attorneys for Plaintiff.

[Verdict.]

*In the Circuit Court of the United States, for the
Southern District of California, Southern Division.*

No. 1527.

ALICE M. GILLILAND,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
ROAD COMPANY (a Corporation),

Defendant.

We, the jury in the above-entitled cause, find in
favor of the plaintiff, in the sum of \$5000 00/100.

Los Angeles, October 27, 1910.

H. B. WOODILL,

Foreman.

[Endorsed]: No. 1527. U. S. Circuit Court, Southern District of California, Southern Division. Alice M. Gilliland v. Atchison, Topeka and Santa Fe Railway Co. Verdict. Filed October 27th, 1910. Wm. M. Van Dyke, Clerk.

[Judgment.]

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial
Circuit, Southern District of California, South-
ern Division.*

No. 1527.

ALICE M. GILLILAND,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY (a Corporation),

Defendant.

This cause coming on regularly for trial on the 25th day of October, 1910, being a day in the July Term, A. D. 1910, of said Circuit Court of the United States, for the Southern District of California, Southern Division, before the Court and a jury of twelve (12) men duly impaneled; W. O. Morton, Esq., and Harry A. Hollzer, Esq., appearing as counsel for plaintiff, and A. H. Van Cott, Esq., appearing as counsel for defendant, and the trial having been proceeded with on said 25th day of October, 1910, and on the following 26th and 27th days of October, 1910, and witnesses having been sworn and examined and documentary evidence having been introduced on behalf of the respective parties, and the evidence having been closed, and the cause, after argument by counsel for the respective parties and instructions of the Court, having, on the 27th

day of October, 1910, been submitted to the jury, and the jury on said 27th day of October, 1910, having rendered the following verdict: "In the Circuit Court of the United States, for the Southern District of California, Southern Division. Alice M. Gilliland, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendant. No. 1527. We, the jury in the above-entitled cause, find in favor of the plaintiff, in the sum of \$5000 00/100. Los Angeles, October 27, 1910. H. B. Woodill, Foreman"—and the Court having ordered that judgment be entered herein in accordance with said verdict in favor of the plaintiff and against the defendant in the sum of Five Thousand (5,000.00) Dollars;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court, that Alice M. Gilliland, the plaintiff herein, have and recover of and from *the* The Atchison, Topeka and Santa Fe Railway Company, a Corporation, defendant herein, the sum of Five Thousand (5,000.00) Dollars, together with her, said plaintiff's costs and disbursements in this behalf taxed at \$108.35.

Judgment entered October 27th, 1910.

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: No. 1527. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Alice M. Gilliland vs. The Atchison, To-

peka and Santa Fe Railway Company, a Corporation. Copy Judgment. Filed Oct. 27, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

[Certificate to Judgment-roll.]

*In the Circuit Court of the United States, of the
Ninth Judicial Circuit, in and for the Southern
District of California, Southern Division.*

No. 1527.

ALICE M. GILLILAND,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY (a Corporation),
Defendant.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Southern District of California, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action, and recorded in Judgment Book No. 2, of said Court, for the Southern Division, at page 103 thereof and I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said action.

Attest my hand and the seal of said Circuit Court,
this 27th day of October, A. D. 1910.

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: No. 1527. In the Circuit Court of the United States, Ninth Judicial Circuit, for the Southern District of California, Southern Division. Alice M. Gilliland vs. Atchison, Topeka and Santa Fe Railway Company, a Corporation. Judgment-roll. Filed October 27th, 1910. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded Judgment Register Book No. 2, page 103.

[Order Allowing Objection to Signing of Bill of Exceptions, etc.]

At a stated term, to wit, the July Term A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles on Wednesday, the twenty-third day of November, in the year of our Lord one thousand nine hundred and ten, Present: The Honorable OLIN WELLBORN, District Judge.

No. 1527.

ALICE M. GILLILAND,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY (a Corporation),
Defendant.

This cause having heretofore been submitted to the Court for its consideration and decision upon defendant's application for the allowance of its bill

of exceptions and upon plaintiff's objection thereto, and the Court having duly considered the same and being fully advised in the premises, it is now by the Court ordered, that plaintiff's objection to the signing of said bill of exceptions be, and the said objections are allowed, and that the settlement of the said bill of exceptions be, and the same hereby is refused.

*United States Circuit Court, Ninth Circuit, Southern
District of California, Southern Division.*

No. 1527.

ALICE M. GILLILAND,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY,

Defendant.

Petition for a Writ of Error and Supersedeas.

The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant in the above-entitled cause feeling itself aggrieved by the verdict of the jury and the judgment entered on the 27th day of October, 1910, comes now by E. W. Camp and A. H. Van Cott, its attorneys, and files herewith an assignment of error, and petitions said Court for an order allowing said defendant to procure a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give

and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated December 21, 1910.

E. W. CAMP,

A. H. VAN COTT,

Attorneys for Petitioner.

[Endorsed]: No. 1527. U. S. Circuit Court, Ninth Circuit, So. District of California, Southern Division. Alice M. Gilliland, Plaintiff, vs. The A. T. and S. F. Rwy. Co., a Corporation, Defendant. Petition for a Writ of Error and *Supersedeas*. Filed Dec. 22, 1910. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, A. H. Van Cott, Attorneys for Defendant.

*In the United States Circuit Court, Ninth Circuit,
Southern District of California, Southern Division.*

No. 1527.

ALICE M. GILLILAND,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

Assignments of Error.

Comes now the defendant, The Atchison, Topeka and Santa Fe Railway Company, and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, petition for which writ of error is filed at the same time with this assignment of error.

I.

That it appears upon the face of the judgment-roll that said Court erred in entering judgment for the plaintiff therein.

II.

That it appears upon the face of the record that said Court erred in refusing to grant the defendant an extension of time for proposing and settling a bill of exceptions.

III.

That it appears upon the face of the record in said action that said Court erred in refusing to settle a bill of exceptions therein proposed by the defendant.

E. W. CAMP,

A. H. VAN COTT,

Attorneys for the Defendant.

And upon the foregoing assignment of errors and upon the record in said cause the defendant prays that said verdict and judgment be reversed.

Dated December 21, 1910.

E. W. CAMP,

A. H. VAN COTT,

Attorneys for the Defendant.

[Endorsed]: No. 1527. U. S. Circuit Court, Ninth Circuit, So. District of California, Southern Division. Alice M. Gilliland, Plaintiff, vs. The A. T. and S. F. Rwy. Co., a Corporation, Defendant. Assignment of Error. Filed Dec. 22, 1910. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, A. H. Van Cott, Attorneys for Defendant.

*United States Circuit Court, Ninth Circuit, Southern
District of California, Southern Division.*

No. 1527.

ALICE M. GILLILAND,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY,

Defendant.

Order Allowing Writ of Error.

Upon motion of Edgar W. Camp and A. H. Van Cott, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the verdict and judgment heretofore entered herein.

Dated Dec. 22d, 1910.

OLIN WELLBORN,
Judge.

[Endorsed]: No. 1527. U. S. Circuit Court, Ninth Circuit, So. District of California, Southern

Division. Alice M. Gilliland, Plaintiff, vs. The A. T. and S. F. Rwy. Co., a Corporation, Defendant. Order Allowing Writ of Error. Filed Dec. 22, 1910. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, A. H. Van Cott, Attorneys for Defendant.

*United States Circuit Court, Ninth Circuit, Southern
District of California, Southern Division.*

No. 1527.

ALICE M. GILLILAND,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY,

Defendant.

Order Staying Proceedings.

The defendant, The Atchison, Topeka and Santa Fe Railway Company, having this day filed its petition for a writ of error from the verdict and judgment made and entered herein to the United States Court of Appeals in and for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which the defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having this day been duly allowed:

NOW, THEREFORE, IT IS ORDERED that upon the said defendant filing with the Clerk of this Court a good and sufficient bond in the sum of Seven Thousand Five Hundred Dollars (\$7,500) to the effect that if the said defendant and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ of error, by said United States Circuit Court of Appeals.

Dated Dec. 22d, 1910.

OLIN WELLBORN,

Judge.

[Endorsed]: No. 1527. U. S. Circuit Court, Ninth Circuit, So. District of California, Southern Division. Alice M. Gilliland, Plaintiff, vs. The A. T. and S. F. Rwy. Co., a Corporation, Defendant. Order Staying Proceedings. Filed Dec. 22, 1910. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, A. H. Van Cott, Attorneys for Defendant.

*United States Circuit Court, Ninth Circuit, Southern
District of California, Southern Division.*

No. 1527.

ALICE M. GILLILAND,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY,

Defendant.

Bond.

Know All Men by These Presents:

That we, The Atchison, Topeka and Santa Fe Railway Company, a corporation, as principal, and A. P. Maginnis and J. C. Drake as sureties, are held and firmly bound unto Alice M. Gilliland, the plaintiff above named, in the sum of Seven Thousand Five Hundred (\$7,500) Dollars, to be paid to Alice M. Gilliland, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 21st day of December, A. D. 1910.

Whereas, the above-named defendant, The Atchison, Topeka and Santa Fe Railway Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the Circuit Court of the United States for the Southern District of California, Southern Division, rendered and en-

tered in said cause on the 27th day of October, 1910.

Now, therefore, the condition of this obligation is such that if the above-named The Atchison, Topeka and Santa Fe Railway Company shall prosecute said writ to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY,

By A. G. WELLS,
Its General Manager.

[Seal] Attest: G. HOLTERHOFF,
Its Western Assistant Secretary.

A. P. MAGINNIS.

J. C. DRAKE.

State of California,
County of Los Angeles,—ss.

A. P. Maginnis and J. C. Drake, the sureties named in and who executed the foregoing bond, being first duly sworn, each for himself, deposes and says:

That he is a resident and freeholder within the said County of Los Angeles, and is worth the sum specified in said bond as the penalty thereof, to wit, the sum of Seven Thousand Five Hundred Dollars (\$7,500), over and above all his just debts and liabilities, in property situated in said county exempt from execution.

A. P. MAGINNIS.
J. C. DRAKE.

Subscribed and sworn to before me this 21st day of December, A. D. 1910.

[Seal]

J. L. B. HAMILTON,

Notary Public in and for the County of Los Angeles,
State of California.

The foregoing bond is hereby approved.

OLIN WELLBORN,

Judge.

[Endorsed]: No. 1527. Circuit Court, Ninth Circuit, So. District of California, Southern Division. Alice M. Gilliland, Plaintiff, vs. The A. T. and S. F. Rwy. Co., a Corporation, Defendant. Bond. Filed Dec. 22, 1910. Wm. M. Van Dyke Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, A. H. Van Cott, Attorneys for Defendant.

[Certificate of Clerk U. S. District Court to Record.]

*In the Circuit Court of the United States of America,
of the Ninth Judicial Circuit, in and for the
Southern District of California, Southern Division.*

No. 1527.

ALICE M. GILLILAND,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial

Circuit, in and for the Southern District of California, do hereby certify the foregoing thirty-two (32) typewritten pages, numbered from 1 to 32 inclusive, and comprised in one volume, to be a full, true and correct copy of the pleadings and of all papers and proceedings upon which the judgment in favor of the defendant was made and entered in said cause, and also of the assignment of errors, petition for and order allowing the writ of error and bond on writ of error in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

I do further certify that the cost of the foregoing record is \$22 65/100, the amount whereof has been paid to me by The Atchison, Topeka and Santa Fe Railway Company, the plaintiff in error in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, this 18th day of January, in the year of our Lord, one thousand nine hundred and eleven and of our Independence the one hundred and thirty-fifth.

[Seal]

WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

[Order Enlarging Time to Docket Cause.]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY (a Corporation),
Plaintiff in Error,

vs.

ALICE M. GILLILAND,

Defendant in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same hereby is, enlarged and extended to and including the 20th day of February, 1911.

Dated at Los Angeles, California, January 18th, 1911.

OLIN WELLBORN,
United States District Judge, Southern District of
California.

[Endorsed]: No. 1945. United States Circuit Court of Appeals, for the Ninth Circuit. The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Plaintiff in Error, vs. Alice M. Gilliland, Defendant in Error. Order Extending Time to File Record. Filed Jan. 20, 1911. F. D. Monckton, Clerk.

[Endorsed]: No. 1945. United States Circuit Court of Appeals for the Ninth Circuit. The Atchison, Topeka and Santa Fe Railway Company (a Corporation), Plaintiff in Error, vs. Alice M. Gilliland, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Southern District of California, Southern Division.

Filed January 19, 1911.

F. D. MONCKTON,
Clerk.

In the United States Circuit Court
of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

ALICE M. GILLILAND,
Defendant in Error.

No. 1945.

BRIEF OF PLAINTIFF IN ERROR.

E. W. CAMP,
U. T. CLOTFELTER,
A. H. VAN COTT,
Attorneys for Plaintiff in Error.

FILED
APR 22 1911

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

ALICE M. GILLILAND,
Defendant in Error.

No. 1945.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was brought by Alice M. Gilliland in the Circuit Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, to recover damages sustained by her while a passenger on one of the trains of the plaintiff in error.

No ground of federal jurisdiction is stated in the complaint beginning at page 5 of the transcript, or in the amendment to the complaint set out on page 18. There is no suggestion of any federal question, nor is there any suggestion of diversity of citizenship, nor is there a suggestion of any other ground of federal jurisdiction.

No question as to the jurisdiction of the federal court was raised in the circuit court. The railway company answered the complaint (see transcript, page 14), the

answer consisting of denials of various allegations of the complaint.

The case was tried, the jury bringing in a verdict for plaintiff in the sum of \$5,000, upon which a judgment was entered (see pages 20 and 21). The Judge declined to sign a bill of exceptions (page 24), whereupon a writ of error was sued out, upon assignments of error set out on page 27 of the transcript.

SPECIFICATION OF ERRORS.

I.

The court erred in not dismissing the complaint for want of jurisdiction.

II.

The court erred in entering judgment for the defendant in error.

ARGUMENT.

It will be unnecessary in this court to do more than suggest the fact apparent on the face of the record that the circuit court was without jurisdiction..

In the case of *The Atchison, Topeka and Santa Fe Railway Company v. Frederickson*, 177 Fed. 206, this court had before it a case in which it was apparent that the plaintiff had intended to allege diverse citizenship, and meant to make that the basis of federal jurisdiction. In the complaint in that action the plaintiff alleged that he was an inhabitant of the City of Los Angeles, in the County of Los Angeles, State of California. In the case at bar it is a matter of mere surmise on what ground of federal jurisdiction the plaintiff intended to rely. If the intention was to rely upon a federal question no suggestion thereof appears, and we cannot imagine how such a question could arise in this case; and so, too, if the intention was to rely upon diverse citizenship no suggestion of that fact is made.

It has been repeatedly held, as this court held in the *Frederickson* case, *supra*, that:

“Absence of sufficient averments of diversity of citizenship, or of facts in the record showing such a diversity, is vital; and the defect cannot be waived by the parties, nor can their consent confer jurisdiction.”

It is respectfully submitted that the judgment of the circuit court ought to be reversed and the case remanded with instructions to dismiss.

Dated, April 17, 1911.

E. W. CAMP,
U. T. CLOTFELTER,
A. H. VAN COTT,

Attorneys for Plaintiff in Error.

No. 1945.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Atchison, Topeka and Santa
Fe Railway Company, a cor-
poration,

Plaintiff in Error,

vs.

Alice M. Gilliland,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

W. O. MORTON AND

HARRY A. HOLLZER,

Attorneys for Defendant in Error.

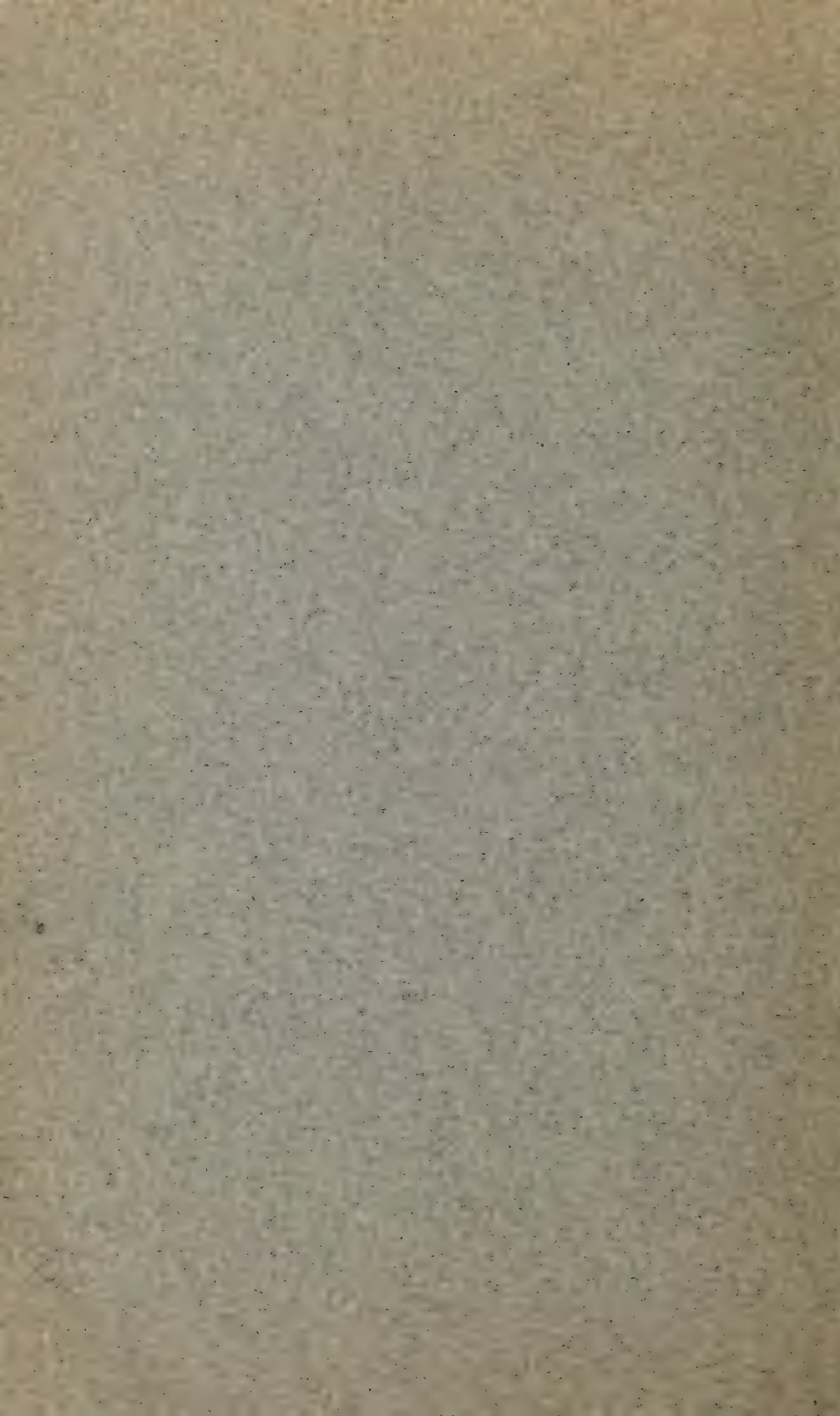
NEWMAN JONES,

Of Counsel.

Parker & Stone Co., Law Printers, 233 New High St., Los Angeles, Cal.

FILED

MAY 1 - 1911



United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

**The Atchison, Topeka and Santa
Fe Railway Company, a cor-
poration,**

Plaintiff in Error,

vs.

Alice M. Gilliland,

Defendant in Error.

No. 1945.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an action brought by the defendant in error (plaintiff in the court below) to recover damages for personal injuries suffered by her while a passenger on one of the railway trains of the plaintiff in error.

No question was raised in the court below as to the jurisdiction of the court. The railway company, on the contrary, answered and went to trial upon the merits, and three days of the time and attention of the Circuit Court and of the jury of twelve men empaneled there-

in, were consumed in the trial, at the conclusion of which the jury returned a verdict in favor of the plaintiff in the action for the sum of five thousand dollars, and judgment for that amount was thereupon entered. [Tr. p. 21.]

The assignments of error, set out on page 27 of the transcript, are as follows:

I.

“That it appears upon the face of the judgment roll that said court erred in entering judgment for the plaintiff therein.

II.

“That it appears upon the face of the record that said court erred in refusing to grant the defendant an extension of time for proposing and settling a bill of exceptions.

III.

“That it appears upon the face of the record in said action that said court erred in refusing to settle a bill of exceptions therein proposed by the defendant.”

But it nowhere, except possibly inferentially from the order of the court refusing the settlement of the same [Tr. p. 24] appears that the plaintiff in error ever made any bill of exceptions; and it nowhere either inferentially or otherwise, appears that it ever served the same, or presented the same within the time allowed by law, or that it ever within the time allowed by law applied to the court or to anyone else for an extension of time for proposing or settling the same; and by reference to its brief on file we find that the assignments in this connection are passed without pretense of argument and are thereby abandoned; and there is not now before this court any contention whatever to the effect that the plaintiff in

error has failed without fault upon its part to bring before this court the evidence whereby it might appear or be made to appear whether or not this was a case in which the trial court was in fact without the jurisdiction necessary to render the judgment in question.

But in the place of these abandoned assignments the plaintiff in error now for the first time asserts that the Circuit Court was without jurisdiction, and makes this its first and main, and only reliance.

ARGUMENT.

The Atchison, Topeka & Santa Fe Railway Company v. Frederickson, 177 Fed. 206, was another case in which the same plaintiff in error, represented by the same able counsel as in this case, carefully reserved its objection to the jurisdiction of the Circuit Court until the case was in this court on writ of error. The court, in its decision in that case, say that

“There was no ground of jurisdiction other than diversity of citizenship of the parties, and the only allegation as to the citizenship of the defendant in error was that he is an inhabitant of the city of Los Angeles in the county of Los Angeles, state of California. On the witness stand he testified that his ‘home’ was in Detroit, Mich. * * * Absence of sufficient averments of diversity of citizenship *or of facts in the record showing such diversity, is fatal*; and the defect cannot be waived by the parties, nor can their consent confer jurisdiction.
* * *

“It follows that the judgment must be reversed, and the case remanded to the Circuit Court, with instructions to dismiss the same.”

And the plaintiff in error in this case in its brief on file herein cites that case and that case only as an all sufficient authority upon which it bases its application for the same result in this case.

We respectfully propose, however, to point out wherein the situation and conduct and attitude of the plaintiff in error in this case differs substantially and materially from its situation and attitude and conduct in that one, and wherein and why it is that the decision of the court in that case is not authority in this and does not and should not legally, or reasonably or properly demand, or justify, the same result arrived at in that case.

(a). In the first place, then, it is to be noted that in the Frederickson case, the plaintiff in error carefully prepared and perfected its bill of exceptions,—that is to say, the higher evidence,—whereby it appeared, and by reason of which this court was not only enabled but compelled to know and take cognizance of the fact that the plaintiff had not only failed to allege the necessary diversity of citizenship, but that he had failed also to prove it at the trial and that the Circuit Court was, therefore, at the time it gave judgment, actually without the jurisdiction which, under and according to the doctrine of the courts in *Sun Printing & Publishing Ass'n. v. Edwards*, 194 U. S. 377, and in *First Natl. Bank v. Crowley*, 183 Fed. 578, it would have had if the plaintiff, notwithstanding the defect of his complaint, had shown by his proofs that the necessary diversity in fact existed. But in the case at bar the plaintiff in error, as we have shown, fails, without any excuse whatever, to bring before this court this higher evidence.

It is a presumption of the law, which has been codified into the statutes of this state "That higher evidence would be adverse from inferior being produced." (Sec. 1963, Sub. 6, C. C. P.) It is true this presumption is ordinarily rebuttable. There is in this case, however, nothing to rebut it, but on the contrary every reasonable consideration to sustain it.

We do not pretend or contend that the jurisdiction of the Circuit Court can be made to appear by presumption. But we do contend that it cannot be made to disappear at the will or pleasure of an unsuccessful litigant, when once it has appeared and attached in and by the evidence at the trial of the case upon its merits; and that it will be and should be conclusively presumed as against the litigant who omits all the evidence from his record on writ of error, that the evidence, if included, would have sustained the judgment.

The distinguished counsel for the plaintiff in error,—deservedly in the highest standing in this and every court where they are known,—have not for three days consumed the time and attention of the Circuit Court and the jury therein knowing all the time and until after the verdict and judgment therein, that jurisdiction in that court did not in point of fact exist, and they will not say so; and they ought not to be admitted (if such a thing were conceivable) to be heard to say so; and no inference or presumption of that sort can be entertained or considered. The conclusion, on the contrary, is irresistible and not to be denied that the jurisdiction did in fact sufficiently appear in the evidence, and that the case was in fact and in good faith tried to its final ending in

the Circuit Court by the parties and the court and all concerned upon that undisputed and accepted theory and understanding.

Nor is this conclusion in conflict with the point really decided in any of the cases cited by the plaintiff in error in its brief in the Frederickson case, or by this court in its opinion therein. In every one of those cases in which there was a trial upon the merits, the evidence whereby it affirmatively appeared that jurisdiction had not in point of fact been proven in the trial court was brought up by the plaintiff in error or the appellant, by bill of exceptions or otherwise, and was before the Appellate Court. And we respectfully submit that the decisions in those cases are not authority in this, and that the conclusion drawn therein is not the one that should be arrived at in this.

It is admitted that jurisdiction, in the federal courts, cannot be conferred by consent, nor be made to appear by presumption merely. But the conduct of the court and of the parties may be such that it cannot be doubted that jurisdiction did in fact appear and attach; and it is upon this principle that we rely in support of the judgment in this case.

Thus, in *Railway Company v. Ramsey*, 22 Wall. 322, 328, which was a case removed from a state court, the averment of citizenship did not appear in the pleadings, but the parties, by stipulation and agreement placed on file, admitted that the cause was brought into the Circuit Court by transfer from the state court in accordance with the statutes in such case provided; and by the same stipulation it was made to appear that all the original

files in the cause had been destroyed by fire. The court held that, while consent of parties cannot give the courts of the United States jurisdiction, they may admit facts which show jurisdiction, and the courts may act judicially upon such admission, *and that it would be presumed that the petition for removal stated facts sufficient to entitle the party to have the transfer made.* Said the Chief Justice, speaking for the court: "*As both the court and the parties accepted the transfer, it cannot for a moment be doubted that the files did then contain conclusive evidence of the existence of the jurisdictional facts.*"

(b). And in the second place, the conclusion and decision arrived at in the *Frederickson* case,—that is to say, "that the judgment must be reversed, and the cause remanded to the Circuit Court, with instructions to dismiss the same,"—is not an authority, or conclusive in this case, for the additional reasons:

First, there was not in that case, so far as appears from the briefs on file, any representation, or intimation, nor the slightest suggestion to this court upon the part of the defendant in error, that the diversity of citizenship necessary to clothe the court with jurisdiction, did in point of fact exist; and,

Secondly, the defendant in error in that case did not, (so far at least as appears by his brief on file, and so far as we are informed), ask of this court that in the event of a reversal it might be with instructions to the lower court to permit, if requested, an amendment and hearing thereon upon the question of jurisdiction alone, and the entry of final judgment in accordance therewith.

In the case now at bar the defendant in error respectfully begs leave to inform this court that she is and at the time of the commencement of this action was and long has been, a citizen and domiciled in and resident of the state of New York, and that the plaintiff in error herein is and was at the time of the commencement of this action a corporation duly organized and existing under the laws of the state of Kansas, and having its principal office and place of business in that state, and that it therefore is, and within the meaning and contemplation of the law was, at the time of the commencement of this action a citizen and resident of and domiciled in that state; and that according to our understanding, both now and at the time of the trial in the Circuit Court, these facts did sufficiently appear in evidence at and upon the said trial; and in this connection the defendant in error respectfully requests of this court that in the event of a reversal of the judgment of the lower court by this court it may be with instructions to the court below to permit the defendant in error to amend its complaint by inserting therein the necessary and proper allegations in respect of the citizenship and domicile and residence of the defendant in error, as above suggested, and that if these jurisdictional averments be denied by the plaintiff in error, that the issue thereby made be tried in the Circuit Court according to the practice with respect to pleas in abatement; but that the verdict heretofore rendered by the jury in that court be not set aside; and that if the issue in respect of the jurisdictional averments referred to be determined in favor of the defendant in error, judgment in her favor be given and made as though those

averments had been contained in her complaint from the beginning.

And in support of this request, and in addition to the very long list of cases that might be cited for the purpose of showing the practice of the Circuit Courts of Appeal to reverse (where necessary or proper), with instructions to the lower courts to allow an amendment in respect of the jurisdictional averments, if requested, we respectfully and more particularly refer to the decisions of the Circuit Court of Appeals of the First Circuit, given January 20th, 1898, in the case of *Fitchburg Ry. Co. v. Nichols*, 85 Fed. 869, and to the decision of the Circuit Court of Appeals of the Seventh Circuit, given January 14th, 1908, in the case of *Grand Trunk Western Ry. Co. v. Reddick*, 160 Fed. 898.

The case first mentioned was an action at law to recover damages for personal injuries received by the plaintiff while in charge of cattle on a railway train. In the Circuit Court the verdict and judgment were for the plaintiff and the defendant sued out a writ of error to the Circuit Court of Appeals, and the decision of that court in that case is as follows:

“Putnam, Circuit Judge. The record in this case contains the suitable allegations to show the citizenship of the corporation defendant in the court below, but it fails in this respect as to the plaintiff below. There are only two courses open. If the plaintiff below is an alien, or a citizen of some state other than Massachusetts, the record may be amended in this court according to the truth by the consent of both parties. *Fletcher v. Peck*, 6 Cranch 87, 127; *Kennedy v. Bank*, 8 How. 586, 611; *U. S. v. Hopewell*, 51 Fed. 798, 800, 2 C. C. A. 510; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 9 C. C. A. 468, 61 Fed. 237, 245. If this is not done, the judg-

ment of the court below must be reversed. It is not necessary to set aside the verdict, as the court below may allow an amendment, in accordance with the facts, to supply the defect, as well after verdict as before, provided it gives the adverse party an opportunity to meet the new issue thus raised, if that party is advised to do so. All this is not only in accordance with the general principles of law, but is emphasized by section 954 of the Revised Statutes, and paragraphs 1 and 3 of rule 11 of the Circuit Court. Of course, if an amendment is not made, or the issue made by it is not sustained, it will be the duty of the court below to dismiss the suit. It is ordered that the judgment of the Circuit Court be reversed, without costs for either party in this court, and that the case be remanded to the Circuit Court for further proceedings according to law, unless an amendment is made in this court on or before February 1, 1898, as provided in this opinion."

In the case of *Grand Trunk Western Ry. Co. v. Reddick*, *supra*, the deceased, Leiferman (represented by the plaintiff, as administrator), was killed in an accident in Illinois on the railroad of the defendant railway company. The verdict and judgment in the Circuit Court were for the plaintiff and the defendant prosecuted a writ of error to the Circuit Court of Appeals, and that court in its decision say that:

"The trial was free from error throughout. But the judgment must be reversed on account of plaintiff's omission respecting citizenship. A question remains. How far ought the proceedings to be opened up? Defendant confessed the cause of action. The damages were properly proved and assessed. The justice of the matter is that plaintiff should not be required to go through another trial unless that course is unavoidable. Jurisdiction and merits are separate questions, and may properly be determined separately. Want of jurisdiction, by the very nature of the question, is merely a matter of abatement. If plaintiff had averred that he was a citizen of

Illinois and defendant a corporation organized and existing under the laws of Michigan, and if defendant could honestly have challenged those allegations or either of them, the issue could have been determined in advance of a trial on the merits. We see no just reason why, after a trial on the merits, the logically separable matter of jurisdiction should not be determined. *Fitchburg R. Co. v. Nichols*, 85 Fed. 869, 29 C. C. A. 464; *Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535; *Everhart v. Huntsville College*, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623; *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. Ed. 914. If, after plaintiff amends, the jurisdictional averments should be denied, the issue may be tried according to the practice with respect to pleas in abatement.

“The judgment is reversed, with the direction to proceed in conformity with this opinion.”

We respectfully submit that the sense of justice which prevailed and controlled in the cases referred to should control also in this case in the event that this court should find it necessary or proper to reverse the judgment of the Circuit Court. We rely, however, upon the reasons and authority hereinbefore presented in support of that judgment, and respectfully submit that the same should be affirmed. If, however, it be reversed, we respectfully request that it be with directions or instructions to the Circuit Court as hereinbefore indicated.

Respectfully submitted,

W. O. MORTON AND

HARRY A. HOLLZER,

Attorneys for Defendant in Error.

NEWMAN JONES,

Of Counsel.

No. 1945.

IN THE
United States
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FOR THE NINTH CIRCUIT

The Atchison, Topeka and Santa
Fe Railway Company, a cor-
poration,

Plaintiff in Error,

vs.

Alice M. Gilliland,

Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

W. O. MORTON and

HARRY A. HOLLZER,

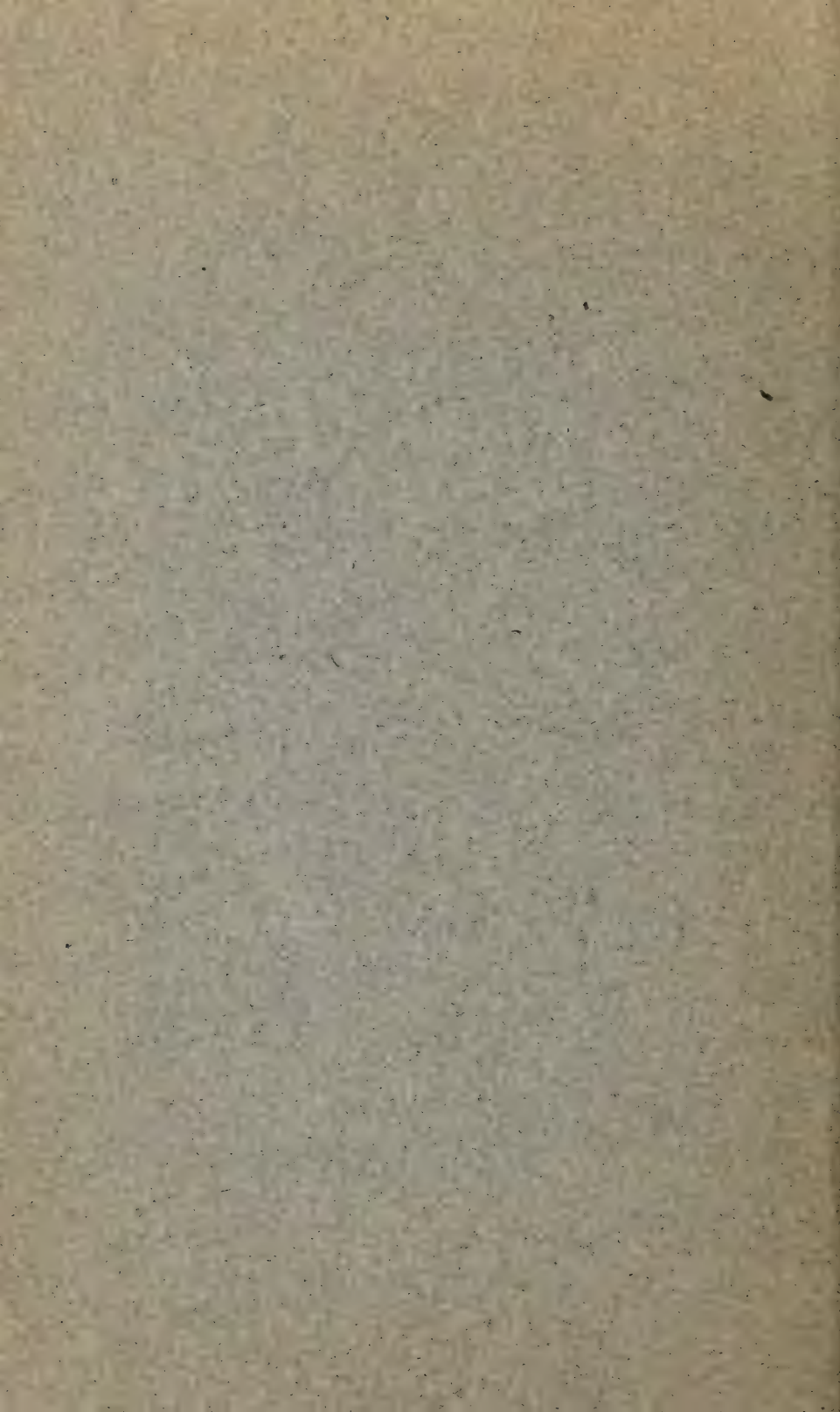
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Alice M. Gilliland,

Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

By leave of court first had and obtained the defendant in error respectfully files this her supplemental brief touching certain of the questions arising or suggested during the oral argument had upon the hearing in open court on May 1, 1911:

I.

We had occasion during the oral argument to refer, by way of argument, to what we then understood and now understand to be the well settled rule, that an action

will not be dismissed by a Circuit Court of Appeals on the ground that the pleadings do not show the requisite diversity of citizenship to give the Circuit Court jurisdiction, where the requisite jurisdictional facts appear in the evidence embodied in a bill of exceptions contained in the transcript.

And the point we were in this connection endeavoring to make and illustrate was this: That the defeated litigant does not, in such a case, *confer jurisdiction* by perfecting the bill of exceptions. The jurisdiction in such a case already exists, and has appeared and attached in and by the evidence, and the defeated party, even as he could not by the mere making of a bill of exceptions confer it, neither could he by failing or neglecting to perfect a bill of exceptions withdraw or withhold the jurisdiction already attached.

The point, in short, which we were endeavoring to make was, that the bill of exceptions in such cases is only *a means, and not the only means*, by which it may appear by the record to the satisfaction of this court, that the requisite diversity of citizenship not only does in point of fact exist, but that it also sufficiently and satisfactorily appeared in and by the evidence at the trial, whereby the trial court became and was vested and endowed with jurisdiction,—which, as it was in no wise dependent upon, neither could it be in any manner divested by, anything that the defeated party might see fit to do or neglect to do. The judgment in such a case is not void merely if or because the defeated party neglects or omits to perfect a bill of exceptions. As against any collateral attack, it will take care of itself, (*Cutler v. Huston*, 155

U. S. 423), and upon direct attack, as we contend upon the authority of *Railway Company v. Ramsey*, 22 Wall. 322, all that is or should be necessary is that the jurisdiction of the trial court may appear "either directly or by just inference from any part of the record."

Howe v. Howe etc. Co., 154 Fed. 822, 823.

It appears, in the case at bar, from the transcript and the judgment contained therein [Tr. p. 21], that for three days the learned Circuit Court and the jury empaneled therein and the parties to this action were occupied in the trial of this case upon its merits, and that after verdict and judgment against the railway company it prosecutes this writ of error without any bill of exceptions. It is our contention that in such a case the reasonable, and just and proper inference, and the only reasonable and just and proper inference is that the necessary diversity of citizenship and jurisdiction of the Circuit Court did fully and fairly and sufficiently and satisfactorily appear and attach in and by the evidence given at the trial.

Cases in which there was a bill of exceptions are manifestly not in point, in the case at bar where there is none; and the cases in which the defeated party after a trial upon the merits has prosecuted his writ of error without a bill or exceptions are apparently few; and the learned counsel for the plaintiff in error has cited no such case, and we have found none, in which this contention which we now make has been made and passed upon,—and hence we say that any and all the cases that may be cited, as making against us, wherein our contention now made, was not made or passed upon, are not in point or

authority in this case, where it is made. We are impelled to invoke this general rule of construction of cases, for the reason that we will have no opportunity to distinguish or review the cases that may be cited by the plaintiff in error in reply to this supplemental brief.

In support of the rule referred to and relied upon by us as a basis of argument, that is to say, that an action will not be dismissed by a Circuit Court of Appeals upon the ground that the pleadings do not show the requisite diversity of citizenship to give the Circuit Court jurisdiction, where the requisite jurisdictional facts appear in the evidence embodied in a bill of exceptions contained in the transcript, we respectfully refer to the following cases.

Jumeau v. Brooks (C. C. A. 5th Circuit, June 1, 1901), 109 Fed. 353, and

Briges v. Sperry, 95 U. S. 401, 403,

wherein the Supreme Court, by Mr. Justice Miller, citing *Railway Co. v. Ramsey*, *supra*, say that:

“One of the errors alleged as grounds for reversing the decree in favor of Sperry is, that this amended bill shows no jurisdiction in the Circuit Court. If nothing else be looked at but the bill, there is no jurisdiction shown. But the proceedings in the state court, which are properly here as part of the record of the case, show that it was removed from the state court to the federal court, on account of the citizenship of the parties; and this of itself must have given jurisdiction to the United States court before the amended bill was filed. That jurisdiction is not lost, because the facts on which it arose are not set out in the old or the new complaint. *Railway Company v. Ramsey*, 22 Wall. 322.”

The other cases citing and supporting *Railway Co. v. Ramsey* and read by us upon the oral argument, and which are not cited in our original brief, are as follows:

Howe v. Howe etc. Co., 154 Fed. 820, 822, and
Davies v. Lathrop, 13 Fed. 565.

In the case last cited the plaintiffs having brought the action in the state court, the defendant removed it into the Circuit Court upon a petition alleging the plaintiffs to be citizens of the state of New York, and the defendant to be a citizen of the state of New Jersey, and the case was tried in the Circuit Court and resulted in a verdict for the defendant; and thereupon the plaintiff moved to remand the action to the state court upon the ground that, in fact, one of the plaintiffs was a citizen of the same state with the defendant; and it was this condition which so justly merited and evoked the withering rebuke of the court contained in the language of the learned Chief Justice that,

“The plaintiffs, knowing the truth, chose, instead of moving to remand, and thereby correcting the mistake, to permit the defendant to incur the burden of a trial. Apparently they concluded to take the chances of trial, with the view of remaining silent if it should result favorably, but of springing the objection if it should result adversely. Such practice will not be willingly tolerated, because it is unjust to the party who has been subjected to the expense of a futile trial, and because it imposes upon the court the labor of a nugatory proceeding.”

We refer to this case simply and only for the purpose of illustrating how unreasonable and impossible it is, or should be, for this court, in the absence of a bill of exceptions affirmatively showing it, to entertain for a mo-

ment the inference, or the supposition, that the distinguished counsel for the plaintiff in error in this case have resorted to any such practice, and how just and reasonable it is to draw and act upon the irresistible inference and conclusion that they did not do so, and that the necessary diversity of citizenship did fully appear in and by the evidence at the trial, and that the case was in good faith tried by the court and by the plaintiff in error and all concerned upon that theory and with that understanding.

II.

The learned counsel for the plaintiff in error replying upon oral argument to the second branch or division of the argument contained in our original brief, dealing with the instructions proper to be given by this court in case of a reversal of the judgment of the lower court, admitted that the cases of *Fitchburg Railway Co. v. Nichols*, 85 Fed. 869, and *Grand Trunk Western Railway Company v. Reddick*, 160 Fed. 898, cited and relied upon by us, are in point, and he has not undertaken to deny that the conclusions therein arrived at and announced are just, or that they should prevail in the case at bar, unless it shall be found that they are in conflict, as he claims they are, with certain of the decisions of the Supreme Court of the United States, to which he has referred. We did not succeed in noting all of the cases so cited by counsel, but according to our recollection he cited first, and seemed principally to rely, upon an isolated paragraph from the opinion in *Mexican Central Railway Co. v. Duthie*, 189 U. S. 76, 77, wherein it was said that

“If the complaint or petition had remained as it was originally framed, and the case had then been carried to the Circuit Court of Appeal, that court would have been constrained to reverse the judgment and remand the cause for a new trial, with leave to amend.”

It is manifest, however, that this is no more than the *dictum* of the court, uttered by way of argument merely, and as such not to be considered as an authority either in the court in which it was uttered or in any other, since the complaint or petition referred to had not remained as it was originally framed, and the case had not been carried to the Circuit Court of Appeal, and since furthermore the question and the request we are now considering was neither raised or passed upon in that case in any court.

We remember also that *Robertson v. Cease*, 97 U. S. 646, was another case cited and relied upon by counsel in this connection. It is to be observed, however, that there was not in that case any application to the court for an instruction to the lower court similar to that given in the case of *Grand Trunk Railway Company v. Reddick*, *supra*, and that the propriety of the practice and procedure followed and adopted by the courts in that case and in the case of *Fitchburg Railway Company v. Nichols*, *supra*, was not by the court in any way referred to or considered; manifestly, therefore, the decision of the Supreme Court in that case should not be regarded as determinative in this.

As regards the others of the cases cited by counsel in this connection, we failed to succeed in noting the citations, but so far as we were able to gather from the

extracts therefrom read by counsel, they were either as in the case of *Robertson v. Cease*, not in point, or as in *Mexican Central Railway Company v. Duthie*, but *dictum*.

III.

As to the suggestion or application of the plaintiff in error, in effect that it be permitted to withdraw its plea in bar and plead to the venue, notwithstanding its waiver of that privilege by pleading and going to trial upon the merits, in the Circuit Court.

This suggestion or application (if it can be so considered) appears for the first time in counsel's closing oral argument, and at a time, therefore, when in due course, we had no opportunity to reply thereto, and for that reason we trust it may be thought not improper for us to state our objections thereto in this manner and form.

The first, and perhaps the strongest and best, objection that can be made to this application is, that it is not, and was not at the oral argument even claimed to be, in furtherance of justice. The learned counsel for the plaintiff in error has announced in his oral argument with distinctness that the plaintiff in error in this case intends to stand and rely upon its "strict legal rights." It would be within its strict legal right, if the opportunity occurs, for the plaintiff in error to plead the statute of limitations as against the plaintiff's cause of action in this case. But it is too much, as we respectfully submit, to ask or expect of this court that it will, under the circumstances, willingly co-operate with the plaintiff in error to bring about that opportunity.

The general rule is, undoubtedly, as stated in the Encyclopedia of Pleading and Practice, Vol. 1, p. 34, that:

“After a plea to the merits the defendant cannot withdraw it and plead in abatement, except by leave of court, which will only be granted in general under very special circumstances.”

We know of no authority denying the power of this court to instruct the Circuit Court, in a proper case, as requested by the plaintiff ^{in error} in this respect. But we respectfully venture to believe that the court will not, under the circumstances of this case, do so.

Respectfully submitted.

W. O. MORTON and

HARRY A. HOLLZER,

Attorneys for Defendant in Error.

NEWMAN JONES,

Of Counsel.

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vs.

Alice M. Gilliland,

Defendant in Error.

Memorandum for Plaintiff in Error Filed by Leave of Court.

E. W. CAMP,

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Attorneys for Plaintiff in Error.

Dated May 8, 1911.

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Defendant in Error.

Memorandum for Plaintiff in Error Filed by Leave of Court.

By leave of court granted May 1st, 1911, plaintiff in error submits this supplemental memorandum in answer to the brief and supplemental brief of the defendant in error.

In the supplemental brief at page 5 is cited Railway v. Ramsey, 22 Wall. 322, on the point that jurisdiction of the trial court may appear "either directly or by just inference from any part of the record." That case in-

volved the restoration of a lost record of removal and the effect of it is thus stated in the opinion of the same court in *Denny v. Pironi*, 141 U. S. 121, 35 L. Ed. 657:

“While these cases settle the principle that it is not necessary that the essential facts shall be averred in the pleadings, they show that they must appear in such papers as properly constitute the record upon which judgment is entered, and not in averments which are improperly and surreptitiously introduced into the record for the purpose of healing a defect in this particular.”

In the case at bar the record contains no hint of the citizenship of defendant in error.

In face of the long line of authorities holding that federal jurisdiction must appear somewhere in the record we shall not pursue this subject further.

In fact the rule is so well settled that this court thought it necessary to cite but one case on it in deciding *Atchison etc. v. Frederickson*, 177 Fed. 206. A very recent opinion from the Circuit Court of Appeals of the Second Circuit cites a number of the cases.

Newcomb v. Burbank, 181 Fed. 334.

On the proposition that this court should remand the case with orders that the judgment be vacated but that the verdict shall stand pending a determination of the jurisdictional question, the defendant in error cites two cases:

Pittsburg etc. Ry. Co. v. Nichols, 85 Fed. 869, and
Grand Trunk etc. Ry. Co. v. Reddick, 160 Fed. 898.

In the former the opinion is very brief and does not indicate what was in the record; but apparently the court

was satisfied that no error had occurred at the trial, and that the verdict could not be successfully attacked. In that case it appeared, further, that the citizenship of the corporation defendant was shown, and that citizenship must have been in Massachusetts, because the court says that the Circuit Court would have had jurisdiction if the plaintiff below were a citizen of any other state than Massachusetts. The defendant being a citizen of Massachusetts, the action was properly brought in Massachusetts, if there was any diversity of citizenship at all. That distinguishes the case from the one before this court, for here the right of action accrued in the state of Kansas, the defendant is alleged to be a citizen of Kansas, and the only intimation of the plaintiff's citizenship is the statement contained in the brief for the defendant in error to the effect that she is and has for years been a citizen of the state of New York. It thus appears that this action was not brought in the proper district, since it was brought neither in the district of the defendant's citizenship nor in the district of the plaintiff's citizenship.

In the second case the court examined the bill of exceptions and found the trial free from error throughout, and for that reason allowed the verdict to stand while reversing the judgment. In the present case the court has not before it a bill of exceptions and cannot find for itself that no error was committed at the trial. It has in that behalf only such presumption as always accompanies the action of the trial court.

Moreover, in the case against Reddick it was said that if the plaintiff had averred that he was a citizen of Illi-

nois, in which state the action was brought, and that defendant was a corporation organized under the laws of Michigan, the issue could have been determined, etc. That is to say, the court assumes that it will be necessary, in case of an amendment, for the plaintiff to aver citizenship of one party or the other in the state in which the action is brought.

Defendant in error insists that the plaintiff in error ought to be estopped from questioning in any way the jurisdiction of the court after having allowed the case to go to trial on the merits without suggesting the jurisdictional question, and that therefore the plaintiff in error ought to be deemed estopped from now suggesting that the action was brought in the wrong district, and ought to be estopped from insisting that the action be dismissed or remanded for a trial *de novo*.

Estoppels ought to be mutual. If the defendant in error had failed to recover in the court below, she might on writ of error have urged the same point that has been suggested by the plaintiff in error, and she would not have been estopped to raise that point by the fact that she had chosen the federal Circuit Court for the trial of her case. This was decided in 1804 in the case of *Capron v. Van Noorden*, 2 Cranch. 126, and that ruling has been followed ever since.

In the case of *Halsted v. Buster*, 119 U. S. 341, Halsted, the plaintiff in the court below, was the plaintiff in error and secured reversal on the sole ground that he had failed to allege jurisdictional facts. In other words, a plaintiff omitting to allege jurisdictional facts is in a position at any time and at any stage of the proceeding

to compel a dismissal of the action, for the court cannot compel him to amend his pleading so as to show the jurisdiction of the court. He can experiment, and if he finds himself likely to be successful, may either, by amendment of the pleadings or perhaps by evidence and findings without amendment, cure the jurisdictional defect, whereas, if he finds himself likely to be beaten, he may call the court's attention to the lack of jurisdiction and forsake that tribunal to try his fortunes elsewhere.

The exceptional state of the record may possibly have justified the courts of the first and seventh circuits in the Pittsburg case and in the Great Western case above referred to in permitting the verdict to stand, but they are the only cases in which such a course has been followed, while in scores of cases, both in the circuit courts of appeal and in the federal Supreme Court, lack of jurisdictional averments has been made the ground either for an outright dismissal of the case or for a new trial on all the issues, after an amendment. This practice has been so uniform that the United States Supreme Court, in *Mexican Cent. Ry. v. Duthie*, 189 U. S. 76, a case in which jurisdiction depended upon diversity of citizenship, which had at first been insufficiently alleged, said:

“If the complaint or petition had remained as it was originally framed and the case had then been carried to the Circuit Court of Appeals that court would have been constrained to reverse the judgment and remand the case for a new trial, with leave to amend.”

So, in the case of *Robertson v. Cease*, 97 U. S. 646, where the jurisdiction depended on diversity of citizenship, which was not sufficiently alleged, the court said:

“Since the record shows no case of which the Circuit Court had jurisdiction we do not feel at liberty upon this writ of error to determine any point affecting the merits of the litigation. The judgment of the Circuit Court is therefore reversed, with directions to grant a new trial, and for such further proceedings as may be in conformity to this opinion.”

Inasmuch as a plaintiff waives nothing by failure to allege jurisdiction, and is in no wise estopped by such failure, we contend that if the defendant in error is to be permitted to amend her complaint by averring jurisdictional facts it should be upon the terms that the defendant may withdraw its appearance and file any plea to the amended complaint which it might in the first instance have filed, the same as if the amended complaint were the original complaint in the action.

From our study of the opinion of this court in the Frederickson case, 177 Fed. 206, we gather that the reason why this court did not in that case permit an amendment of the complaint was because it appeared from the bill of exceptions that the plaintiff if a citizen of any state was a citizen of Michigan, and it also appeared that the defendant in that case was a corporation of the state of Kansas, so that it was certain that if the complaint had been properly framed in the first place it would have shown upon its face that the action was brought in a district where neither the defendant nor the plaintiff was domiciled. The same reason for declining to remand the case with leave to amend exists in the present case. For from the statement made in the brief as

to the citizenship of defendant in error it appears that this action ought never to have been brought in the Circuit Court of the Southern District of California, nor in any district of the Ninth Circuit, but either in Kansas or in New York.

Dated May 8, 1911.

Respectfully submitted.

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